Supreme Court, U.S.
FILED

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No. 99 600

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In The

Supreme Court of the United States

ROBERT S. FLOWERS, M.D.,

Petitioner,

v.

SHERRIE T. SEKI, CYNTHIA S. NAKAMURA, IRENE NAKANO, and OWEN TAMAMOTO, individually and in their official capacities as attorneys for the Regulated Industries Complaints Office, Department of Commerce and Consumer Affairs, State of Hawaii; EARL HARADA, individually and in his official capacity as investigator for the Regulated Industries Complaints Office, Department of Commerce and Consumer Affairs, State of Hawaii; KATHRYN MATAYOSHI, in her official capacity as Director of the Department of Commerce and Consumer Affairs, State of Hawaii; and SHARON ON LENG, in her official capacity as Complaints and Enforcement Officer of the Regulated Industries Complaints Office, Department of Commerce and Consumer Affairs, State of Hawaii,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

PETER VAN NAME ESSER
Counsel of Record
DAVID L. TURK
Suite 400, Seven Waterfront Plaza
500 Ala Moana Boulevard
Honolulu, Hawaii 96813
(808) 538-3636
Attorneys for Petitioner
Robert S. Flowers, M.D.

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OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

A. DID THE DISTRICT COURT AND A NINTH CIRCUIT PANEL DISREGARD ANOTHER PANEL'S FINDING OF SUBJECT MATTER JURISDICTION IN A PRIOR APPEAL, IN VIOLATION OF THE LAW OF THE CASE DOCTRINE DESCRIBED IN *CHRISTIANSON V. COLT INDUSTRIES*?

B. DID PETITIONER, A PHYSICIAN, STATE A CLAIM FOR INJUNCTIVE RELIEF UNDER 42 U.S.C. § 1983 AND *YOUNGER V. HARRIS* AGAINST RESPONDENTS, STATE OFFICIALS, BY ALLEGING THEY FILED A BAD FAITH MEDICAL LICENSE PROCEEDING AGAINST HIM WITH NO HOPE OF OBTAINING A REVOCATION?

C. DID THIS COURT'S PLURALITY OPINION IN *ALBRIGHT V. OLIVER* REGARDING PROSECUTIONS WITHOUT PROBABLE CAUSE, OVERRULE *YOUNGER V. HARRIS* AND ELIMINATE FEDERAL INJUNCTIONS AGAINST BAD FAITH STATE PROSECUTIONS?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Robert S. Flowers, M.D., prays that a writ of certiorari issue to review two rulings of the Ninth Circuit Court of Appeals entered in this proceeding on June 7, 1996, and April 6, 1999. While Petitioner seeks review of unpublished opinions, and the dismissal of claims filed by an individual surgeon practicing 5000 miles from this Court, the history of this case raises fundamental questions regarding law of the case, the abuse of government power, and the viability of a century-old federal remedy used to enjoin bad faith state prosecutions.

Two Ninth Circuit panels weighed identical jurisdictional questions in this case. Respondents, state officials charged with prosecuting a bad faith medical license revocation proceeding, twice sought dismissal of Petitioner's claims under *Albright v. Oliver,* 510 U.S. 266 (1994), insisting this 1994 ruling disallowing claims to enjoin prosecution without probable cause similarly barred claims to enjoin bad faith prosecutions under *Younger v. Harris*, 401 U.S. 37 (1971).

In 1996 a Ninth Circuit panel rejected Respondents' *Albright* arguments, recognized a claim under *Younger*, and ordered a preliminary injunction and $41,000 in fees.

In 1999 a second Ninth Circuit panel disregarded the 1996 ruling, embraced Respondents' *Albright* arguments, and dismissed this lawsuit for failure to state a claim.

The second panel erred. "The prior decision should be followed unless [it] is clearly erroneous and its enforcement would work a manifest injustice[.]" *Christianson v. Colt Industries,* 486 U.S. 800, 819 (1988). "Perpetual litigation on any issue – jurisdictional or nonjurisdictional – delays, and therefore threatens to deny, justice." *Id.* at 816 n.5.

On the merits, "the threats to enforce the statutes against appellants [were] not made with any expectation of securing valid convictions[.]" *Dombrowski v. Pfister,* 380 U.S. 479, 482 (1965). "These circumstances sufficiently establish the kind of irreparable injury, above and beyond that associated with the defense of a single prosecution brought in good faith,

that has always been considered sufficient to justify federal intervention." *Younger,* 401 U.S. at 48.

OPINIONS BELOW

The April 6, 1999, decision of the Ninth Circuit in *Flowers v. Seki,* No. 98-15440 (Appendix A), and the February 13, 1998, district court order which it affirmed, CV-91-00616 DAE (Appendix B), are not reported. The June 7, 1996, decision of the Ninth Circuit in *Flowers v. Seki,* No. 94-16039 (Appendix F), and the May 13 and 19, 1994, district court orders in CV-91-00616 HMF which it reversed (Appendices D and E), are not reported.

JURISDICTION

The judgment in No. 98-15440 was filed on April 6, 1999 (Appendix A). A timely petition for rehearing and suggestion for rehearing en banc was denied on July 9, 1999 (Appendix C). The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343 and 1346, and 42 U.S.C. § 1983. The Ninth Circuit had jurisdiction under 28 U.S.C. § 1291. This Court's jurisdiction is timely invoked under 28 U.S.C. § 1254(1).

STATUTES

The text of Federal and Hawaii statutes cited in the petition are provided in Appendix G.

STATEMENT OF THE CASE

Petitioner is an internationally renowned, board-certified, plastic and reconstructive surgeon, who has practiced medicine in Hawaii for 29 years. Respondents are lawyers, investigators, and other officials working for Hawaii's Department of Commerce and Consumer Affairs, in Honolulu.

On December 17, 1993, Respondents filed *In re Robert S. Flowers, M.D.,* MED Nos. 90-90-L *et seq.*, a license revocation proceeding charging Petitioner with gross negligence under *Haw. Rev. Stat.* Section 453-8. ER 1.

On March 9, 1994, Petitioner filed *Flowers v. Seki*, CV-00190-DAE, in the District Court for the District of Hawaii, claiming Respondents were violating his civil rights under 42 U.S.C. § 1983 by pursuing a license revocation proceeding in bad faith against him without a reasonable expectation of success. ER 2. Their actions reduced his patient load, denied him hospital privileges, increased his insurance premiums, disqualified him from a medical school professorship, barred him from practicing medicine in other states, and violated his constitutional rights. *Id.* Petitioner requested injunctive relief against all Respondents and damages against some in their individual capacity. *Id.*

On March 9, 1994, Petitioner filed a motion for preliminary injunction. ER 3. He cited *Younger, supra, Shaw v. Garrison*, 467 F.2d 113 (5th Cir.), *cert. denied*, 409 U.S. 1024 (1972), and *Privitera v. California Bd. of Medical Quality Assur.*, 926 F.2d 890 (9th Cir. 1991), asking the court to stop the bad faith prosecution against his license. *Id.*

On March 24, 1994, Respondents filed their opposition to this motion requesting abstention under *Younger, supra*. ER 50 at 1. They *also argued* Petitioner "asserts no federal right giving rise to jurisdiction in the first instance." *Id.* at 2. "Plaintiff has asserted no claim for which relief can be granted under 42 U.S.C. § 1983," insisted Respondents:

> Plaintiff's claim is the civil equivalent of *Albright v. Oliver*, [510 U.S. 266] (1994). In *Albright*, the petitioner asked the Supreme Court to recognize a substantive right under the Due Process Clause of the Fourteenth Amendment to be free from criminal prosecution except upon probable cause.

ER 50 at 2, 5. "Here," said Respondents:

> the State has initiated a process *which may, or may not, lead eventually to disciplinary sanctions* against Dr. Flowers, including possible revocation or limitation of his license to practice.

ER 50 at 3 (emphasis added). Respondents declared:

> Plaintiff claims a federal constitutional right to judicial review or oversight of the decision to prosecute administrative disciplinary proceedings against his medical license. Given the Supreme Court's refusal to require such review in criminal matters, and its refusal in *Albright* to recognize a substantive due process right to be free from prosecution except upon probable cause, there can be no federal oversight of state administrative proceedings involving no present impact upon a protected property or liberty interest.

ER 50 at 4. Respondents cited *Paul v. Davis,* 424 U.S. 693 (1976) and *Siegert v. Gilley,* 500 U.S. 226 (1991), and argued Petitioner does not have a "protected interest in reputation." *Id.* They also cited *Mishler v. Nevada State Board of Medical Examiners,* 896 F.2d 408 (9th Cir. 1990), and insisted Petitioner had not yet been deprived of his right to practice medicine. ER 50 at 5.

On March 31, 1994, Respondents filed a motion to dismiss under *Fed. R. Civ. P.* Rule 12(b), again declaring, "the complaint cites no claim upon which relief can be granted." ER 51 at 2. "There is no allegation of a recognized federal right." *Id.* at 2-8.

On May 13, 1994, the late District Judge Harold M. Fong denied Petitioner's motion for preliminary injunction, abstaining under *Younger. See* Appendix D. Before reaching the abstention issue, however, Judge Fong expressly addressed and rejected Respondents' *Albright* claims:

> [Respondents] assert that the court lacks jurisdiction over this matter because plaintiff asserts no federal right that would give rise to jurisdiction. [They] rely on a Supreme Court case, *Albright v. Oliver,* [510 U.S. 266] (1994), in which the Court declined to recognize a substantive due process right "to be free from criminal prosecution except upon probable cause."

Appendix D. "In the instant action," wrote Judge Fong, "plaintiff has asserted a specific constitutional right – the right to be free from bad faith prosecution." *Id.* Said the court:

> If plaintiff successfully establishes that the prosecution itself is proceeding in bad faith, then the due process safeguards of the prosecution are of no avail to plaintiff's immediate and ongoing injury. While *Albright* stands for the principle that there is no constitutional right to be free from prosecution without good cause, the constitutional right to be free from bad faith prosecutions is well established.

Appendix D at 8. "[I]t is clear that the court has jurisdiction over this § 1983 action on the basis of plaintiff's allegation of bad faith." *Id.* at 9.

On May 16, 1994, Judge Fong heard Respondents' first motion to dismiss. ER 56. Respondents cited *Albright:*

> I would like to again urge the Court and point out to the Court that in the *Albright v. Oliver* case which we have cited and rely upon extensively, the court rejected of course the proposition that there is a substantive due process right to be free from criminal prosecution [except] upon probable cause.

ER 56 at 4-5. "*Shaw*," insisted Respondents, "is superceded by *Albright*." *Id.* at 6.

On May 19, 1994, Judge Fong denied Respondents' first motion to dismiss. *See* Appendix E. "As the court held in ruling on plaintiff's motion for injunctive relief," wrote Judge Fong, "plaintiff has alleged a specific federal constitutional right – the right to be free from bad faith prosecution." *Id.* at 2. "Contrary to [Respondents'] assertions, the court thus has jurisdiction over this matter." *Id.*

On June 9, 1994, Petitioner appealed Judge Fong's denial of a preliminary injunction in No. 94-16039. ER 58.

On December 12, 1994, Respondents filed an answering brief explaining their reasons for prosecuting Petitioner:

> Society has long frowned on cosmetic surgery of the type typically practiced by Dr. Flowers, not only because it drains millions if not billions of dollars

> of government and private subsidies from medical procedures that demonstrably save lives, but because that surgery is "sold" to the some [sic] of the most psychologically vulnerable individuals in our society[.]

Appendix F at 6, *quoting*, ER 59 at 25. "Society would be wholly within its rights," Respondents declared, "to *outlaw* what Dr. Flowers does as a crime." *Id.* (emphasis in original). Respondents reiterated their position that the court lacked jurisdiction under *Albright*:

> Dr. Flowers complains of the defamatory impact of the state proceedings, a complaint that does not state a constitutional violation "at all." *Seigert v. Gilley,* 500 U.S. 226, 232 (1991) (discussing *Paul v. Davis,* 424 U.S. 693 (1976)). Plaintiff does not assert that he will not be given notice or an opportunity to be heard, *e.g., Mishler v. Nevada State Board,* 896 F.2d 408, 409 (9th Cir. 1990), or that the Board is biased against him. The rest of Plaintiff's complaint does nothing more than raise (ineffectively, we think) malicious prosecution, and, as this Court stated recently, "[t]he constitutional foundation for a claim of malicious prosecution under § 1983 is a matter of dispute." *Haupt v. Dillard,* 17 F.2d [sic] 285, 290 n.4 (9th Cir. 1994). As the Seventh Circuit has squarely held in light of *Albright v. Oliver,* [510 U.S. 266] (1994), "the institution of a prosecution is not an independent constitutional tort." *Buckley v. Fitzsimmons,* 20 F.3d 789, 798 (7th Cir. 1994). All of the cases relied on by Dr. Flowers are no longer good law in light of *Albright* and its reasoning[.]

ER 59 at 34. Further, in their restated questions on appeal, Respondents included the following:

> 3. Whether, in light of *Albright v. Oliver,* [510 U.S. 266] (1994), Appellant, who faces no interlocutory burdens on his ability to practice medicine, other

> than the asserted defamatory impact of the pendency of state regulatory proceedings against him, has any federal cause of action under § 1983?

ER 59 at 2.

On June 7, 1996, Ninth Circuit Judges Schroeder, Nelson and Kozinski filed an opinion reversing Judge Fong, ordering a preliminary injunction "barring the RICO defendants from pursuing their disciplinary action," and awarding $41,357 in fees and costs. *See* Appendix F at 6. The panel declared:

> The RICO defendants have demonstrated in their brief a substantial bias against both Dr. Flowers and his profession. They assert speculative claims for which they have failed to demonstrate any basis regarding the motives for his professional activities, his income, the psychological profiles of his patients, and the social value of cosmetic surgery[.]

Appendix F at 5. "These bald assertions suggest a harassing motivation irrespective of the evidence and belie defendants' claim of good faith." *Id.* at 6. "We find that Dr. Flowers has demonstrated that the RICO defendants are prosecuting him in bad faith." *Id.* at 3.

The June 7, 1996, opinion did not refer directly to Respondents' *Albright* claims, but declared:

> [E]vidence alone, even if it arises to the level of probable cause, will not bar a finding of bad faith.

Appendix F at 3. The 1996 panel implicitly overruled Respondents' arguments that *Albright, Siegert, Paul,* and/or *Mishler* required dismissal of Petitioner's claims. *Id.*

On July 25, 1996, the parties appeared before District Court Judge David Alan Ezra, who replaced Judge Fong after the latter's untimely death. ER 61 at 1. "[T]he Ninth Circuit has made a finding here for which this court is bound," said Judge Ezra, "it's the law of the case." *Id.* at 3. "[T]he Ninth Circuit – and I think quite properly – reversed." *Id.* at 7. "[T]hey make a specific finding of bad faith," noted Judge Ezra, "I think there's very little left here to litigate." *Id.* at 9.

On August 15, 1996, Petitioner filed a motion to have certain issues recognized as law of the case. ER 63.

On October 4, 1996, Magistrate Judge Barry N. Kurren granted Petitioner's motion finding, "*Albright v. Oliver* is inapposite to this case." ER 66. The magistrate rejected Respondents' argument that the three-judge panel did not address jurisdiction in its 1996 opinion:

> "[t]he doctrine of law of the case encompasses a court's explicit decisions as well as those issues decided by necessary implication."

ER 66 at 4, *quoting, Eichman v. Fotomat,* 880 F.2d 149, 151 (9th Cir. 1989). "By proceeding to address the merits of the appeal, the Ninth Circuit implicitly agreed with Judge Fong's determination of jurisdiction." *Id.*

On January 30, 1997, Judge Ezra adopted the magistrate's ruling. ER 67 at 8. "[The State's] interpretation of *Albright,*" said Judge Ezra, "is overexpansive." *Id.* at 7. "The court agrees with the magistrate's conclusion that *Albright* does not control[.]" *Id.* "Plaintiff has, in fact alleged a violation of a specific constitutional right[.]" *Id.* at 4-5.

On October 30, 1997, Respondents filed a second motion to dismiss, claiming absolute immunity for some Respondents and qualified immunity for all. ER 72. Respondents reiterated their *Albright* arguments and claimed "no violation of clearly established statutory or constitutional rights." *Id.* at 21, *citing, Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). In opposition, Petitioner argued that Respondents violated "clearly established constitutional rights" under *Shaw* and *Privitera* when they filed a bad faith proceeding, and reiterated rulings by Judge Fong, the Ninth Circuit, Magistrate Kurren, and Judge Ezra himself rejecting Respondents' *Albright* arguments. ER 74. Petitioner opposed claims of absolute immunity by showing that Respondents acted as investigators during the Flowers probe. *Id.*

On February 13, 1998, Judge Ezra surprised both parties with a 34-page order dismissing the complaint. *See* Appendix B. He paid little attention to immunity, focusing instead on

"the more significant issue [of] whether Plaintiff has in fact stated a federal claim." Appendix B at 6 n.1. Relying on *Albright,* Judge Ezra found the Ninth Circuit had not considered jurisdiction in its 1996 opinion, and "grant[ed] Defendants' motion to dismiss Plaintiff's claims under 42 U.S.C. § 1983 for failure to state a claim[.]" *Id.* at 34. "[T]he Ninth Circuit clearly found that the state court proceeding fell within the bad faith exception to *Younger* extension," he said:

> [but] neither the Ninth Circuit, nor this court has held that Plaintiff properly alleged a cause of action under § 1983 for violation of Plaintiff's right to be free from bad faith prosecution.

Appendix B at 25.

On March 12, 1998, Petitioner appealed again. ER 80, 81. On April 9, 1999, Ninth Circuit Judges Sneed, Tashima and Silverman affirmed. *See* Appendix A. "Neither this court's prior memorandum decision nor the district court's prior rulings," ruled the new panel, "constituted law of the case and precluded the dismissal of Flowers's [sic] amended complaint." *Id.* at 2. "In the previous appeal," they wrote:

> a panel of this court held only that abstention under *Younger v. Harris,* 401 U.S. 37 (1971), was inappropriate given evidence of the appellees' bad faith. *The panel however, did not explicitly or implicitly find that Flowers alleged a sufficient injury to state a claim under § 1983 or even consider the issue.* Moreover, although the district court previously had stated in general terms that the right to be free from bad faith prosecution was protected by the Constitution, it had not determined that Flowers's [sic] specific cause of action was cognizable under § 1983. Thus, the law of the case doctrine did not bar consideration of the sufficiency of Flowers's [sic] amended complaint.

Appendix A at 3 (emphasis added).

STATEMENT OF FACTS

Petitioner has chaired plastic surgery departments at Hawaii's largest hospitals, and taught surgery at the University of Hawaii. ER 4, 6. He has lectured at Stanford, UCLA and Duke medical schools, and performed surgical demonstrations at symposia in England, Canada, Australia, Japan, France, Germany, Italy, Mexico, Thailand, Russia and Brazil. *Id.* Petitioner has published over fifty scholarly articles and edited a medical treatise in his field. *Id.* He holds an international reputation as a brilliant plastic surgeon. ER 42, 44, 45.

In 1983 a patient of Petitioner died one week after surgery. ER 4, 10, 11. Respondents filed a disciplinary proceeding against Petitioner because of this death. ER 2. Three years later he settled without acknowledging misconduct, agreeing to seek accreditation by the American Association of Accreditation of Ambulatory Plastic Surgery Facilities ("AAAAPSF"), maintain adequate records, refrain from keeping patients overnight, and have a plastic surgeon monitor his practice for 18 months. ER 7.

AAAAPSF inspector and plastic surgeon Dr. Charles A. Vinnik visited Petitioner's clinic in 1988 and 1991. ER 8, 48. "I have found in all respects these facilities to be exemplary," he said, "and meet or exceed all of the standards[.]" ER 48 at 3. Plastic surgeon Dr. Marco Rizzo monitored Petitioner for 18 months and reported, "the care administered by Flowers and his clinic [is] superior to the standard of care administered in this community." ER 9.

On June 19, 1991, Respondents declared, "Dr. Flowers meets all the conditions of the Board's Final Order of February 17, 1988." ER 14 at 6. "[T]here are no other conditions against his medical license." *Id.*

On October 4, 1990, Petitioner performed surgery on Patient 1, a Vietnamese national. ER 2, 4, 10, 25. After surgery Petitioner prescribed pain medication and discharged Patient 1 to her husband's care. *Id.* The next day Patient 1 died of an overdose of pain medication. *Id.* An autopsy

conducted by Honolulu Medical Examiner Dr. Kanthi Gunitilake found "[c]ombined toxic effects of oxycodone and flurazapam" to be the cause of death. ER 11. "The doctor's actions are not involved in this death," said Gunitilake, "everything he did was proper[.]" ER 28. "The cosmetic surgery played no part in her death[.]" *Id.*

Nevertheless, Respondents filed a "staff-initiated" complaint charging Petitioner with gross negligence in the treatment of Patient 1. ER 12. Four months later they "closed" this case, writing Petitioner, "this office has concluded that there is insufficient evidence to show that your treatment of [Patient 1] violated this State's laws[.]" ER 13.

In April 1992 Respondents received a complaint from Petitioner's fired office manager Linda Sains. ER 25. According to Sains, Petitioner used an unlicensed nurse during surgery on Patients 1 and 2, and kept Patient 3 overnight. *Id.* Sains was fired for mismanagement and embezzlement. *Id.* A 1992 audit by CPA Lawrence Turner showed Sains embezzled $211,000 from Petitioner. ER 29.

Respondents re-opened their inquiry of Patient 1's death and began investigating Patient 2. *Id.* Their investigator told local physicians that Petitioner "lost five patients from surgery under suspicious circumstances in the past five years," "three died in his office," and Petitioner "admitted" he was "on narcotics" during surgery. *Id.* These statements were lies. ER 25, 46.

On February 25, 1993, Petitioner told Respondents he'd been offered a professorship at a Kentucky medical school, but officials in that state would not license him because of the Hawaii inquiry. ER 25, 31, 32. In September 1993 the school withdrew its offer because the Hawaii inquiry was still unresolved. ER 25, 32. Petitioner lost funding for a new clinic in 1993 when his bank declined financing for the same reason. ER 52, Exhibit 42.

An April 1992 *Honolulu Advertiser* headline declared, "Charges of Doctor Abuse Called Rare Here." ER 23. "Hawaii ranks low among states," reported the *Advertiser*, "for the number of disciplinary actions taken against doctors

for negligence." *Id.* A similar headline in the *Honolulu Star Bulletin* declared, "Watchdog Group Finds Fault With Isles' Medical System." ER 24. "The State Medical Board is accused," said the *Bulletin*, "of ignoring errant docs." *Id.* Two of Petitioner's patients had died of unknown causes, and he settled a disciplinary action involving a third. His fired office manager offered false testimony. Respondents could rid Hawaii of a "bad doctor," and no longer "rank low among the states for the number of disciplinary actions." ER 23.

On December 13, 1993, Respondents filed a petition listing nine charges of gross negligence concerning Patients 1 and 2, who died, Patient 3, who recovered without incident, and Patients 4 and 5, who were never treated. *Id.* Petitioner was charged with an improper overnight stay, an unlicensed nurse, an improper refund policy, inadequate drug knowledge, poor record-keeping, and a death rate "exceeding the active plastic surgery community for Hawaii[.]" *Id.*

Petitioner submitted his patient records to four prominent physicians for review. *See* ER 42, 44, 45, 48. In affidavits filed with his March 1994 motion for preliminary injunction, these doctors called Respondents' claims "utter fantasy," "fabrications," "horrifying" and "absurd," reflecting "little or no medical training and no regard for the truth." *Id.*

Dr. Victor Hay-Roe is a board-certified plastic surgeon at Honolulu Medical Group with 31 years' experience. ER 44 at 1. He serves on HMG's review board and "regularly evaluates the work of other physicians[.]" *Id.* Dr. Hay-Roe declared:

> This disciplinary petition is unwarranted in its entirety. If the allegations regarding the record-keeping, use of anesthetics, use of personnel or refund practices are valid, then every plastic surgeon in the State of Hawaii is in danger of losing his license. The petition is therefore an attack on the entire profession.

ER 44 at 5.

Dr. Judson McNamara is Hawaii's most prominent thoracic surgeon. ER 45 at 1. As Chairman of the Department of

Surgery at the University of Hawaii's Medical School, he trains plastic surgeons. *Id.* Dr. McNamara declared:

> I do not believe that any fair-minded, reasonable person with even a modicum of medical training or access to medical expertise, could conclude that the allegations in the petition are true and that they merit disciplinary action. It is particularly outrageous that Dr. Flowers should be subjected to this prosecution because the many serious factual errors in the allegations are readily refutable by anyone with medical knowledge who conducts even a cursory review of the records.

ER 45 at 13. "If anyone is guilty of gross negligence, professional misconduct, incompetence, or manifest incapacity in the profession," he said, "it is the persons who have failed in their duty to investigate complaints fairly and prosecute disciplinary actions only when appropriate." *Id.*

Dr. Robert K. Childs is a prominent anesthesiologist who teaches at Burns Medical School and is Chief Anesthesiologist at Queen's Hospital. ER 42. "[A]ny person who reviewed the records and told RICO there was a case against him should be made to pay for whatever cost and inconvenience he has suffered." *Id.* at 12.

Finally, Dr. Charles A. Vinnik inspected Petitioner's clinic for AAAAPSF after the 1987 settlement. ER 48. He sits on its Board of Directors, chairs the Surgery Committee of the American Society of Plastic and Reconstructive Surgeons, and authored the textbook, *Fundamentals of Plastic Surgery*. *Id.* Dr. Vinnik declared:

> One would have to conclude that the persons who undertook the investigation and prepared this petition either have little or no understanding or they have decided without basis that Dr. Flowers is a wrongdoer whose Hawaii license should be revoked, and they have attempted to buttress that conclusion with falsehoods, fabrications and misinterpretations of the records.

ER 48 at 13.

Respondents charged Petitioner with failing to inform Patient 1 of the proper dosage for pain pills. ER 1 at 2. They claimed she "did not speak english [sic] as a first language." *Id.* The accusation is absurd. While Patient 1 and her husband were Vietnamese, they spoke English "fluently." ER 28. Honolulu Medical Examiner Gunitilake absolved Petitioner from any responsibility for Patient 1's death. ER 11, 28.

Respondents claimed Patient 1's records "do not indicated [sic] whether oxygen was administered," which is false. ER 1 at 2. Following convention, the oxygen line was left blank, which means none was given. ER 10; *see also*, ER 42 at 3 (Dr. Childs) ("[t]he person who reviewed the medical records clearly either does not understand medical notation or recklessly failed to review the relevant part"); ER 44 at 2 (Dr. Hay-Roe) ("[t]he records clearly indicate that oxygen was not administered.")

Respondents claimed Petitioner's records "show no signs and symptoms assessment during surgery," which is false. ER 1 at 2-3; *see* ER 42 at 2-3 (Dr. Childs) ("to seek disciplinary sanctions against Dr. Flowers for allegedly not recording signs and symptoms is totally outrageous"); ER 45 at 5 ("a disciplinary petition against Dr. Flowers for failure to record signs and symptoms based on this record is outrageous.")

Respondents claimed Petitioner did not record Lidocaine levels. ER 1 at 2. According to Dr. Hay-Roe, physicians do not record them, and "[s]uch an omission is clearly not a proper basis of disciplinary proceedings." ER 44 at 2; *see also,* ER 45 at 2 (Dr. McNamara) ("I administer Lidocaine directly into the chests of patients without recording the measurements.")

Respondents claimed Patient 1's blood oxygen saturation levels were lower on discharge than at admission. ER 1 at 2. According to Dr. Childs, "the levels were all within the normal range." ER 42 at 4. According to Dr. Hay-Roe, "it is absolutely clear that the patient's blood oxygen saturation level had nothing to do with her death." ER 44 at 3.

Respondents claimed Petitioner took "no discharge criteria prior to discharge" of Patient 1. ER 1 at 2-3. "All standard

discharge criteria are included in the discharge note," insisted Dr. Childs, "[i]t is entirely false for the petition to allege that Dr. Flowers' record on Patient 1 lacked discharge criteria." ER 42 at 3.

Respondents charged Petitioner with "violation of the 1987 settlement agreement" by allowing Patient 3 to remain overnight, which is false. ER 1 at 4. First, Petitioner had no license restrictions in 1992. ER 14, 15, 16, 17. Second, "there was a terrible storm that day," with high winds, traffic advisories, and no ambulance service. ER 25 at 6. Third, his patient felt weak and unable to travel, which took precedence over any settlement agreement. *See* ER at 8 (Dr. McNamara) ("Dr. Flowers did what was best for the patient"); ER 44 at 4 (Dr. Hay-Roe) ("I cannot believe that a settlement agreement would ever require a doctor to put a patient in jeopardy.")

Respondents claimed Petitioner's records on Patient 3 "are ambiguous as to the amount of Narcan administered," which is false. ER 1 at 3. "The chart is not ambiguous," said Dr. Childs, "Narcan was authorized as necessary, but it was not needed; for that reason no quantity was recorded." ER 42 at 6; *see also,* ER 44 at 5 (Dr. Hay-Roe) ("[t]here is no ambiguity[;] Narcan was not used.")

Respondents claimed Patient 3 was "excessively sleepy" after surgery. ER 1 at 4. "Anesthetics work differently for different patients," explained Dr. Childs, "[t]he choice of anesthetics and other medications, their use, and the quantities administered, were entirely appropriate." ER 42 at 7; *see also,* ER 44 at 4 (Dr. Hay-Roe) ("[i]f the petition intends this as a basis of a disciplinary charge, it is without foundation"); ER 45 at 8 (Dr. McNamara) ("absolutely no cause whatsoever for disciplinary action.")

Respondents claimed Petitioner used "unlicensed nurse-anesthetist Marilyn Andrade" on Patients 2 and 3. ER 1 at 4. First, Andrade was a superb nurse who had worked for Petitioner twenty years and was a past President of the Hawaii Association of Nurse Anesthetists. ER 25, ER 41. Second, Petitioner did not administer general anesthesia and

"AAAAPSF standards do not require a nurse anesthetist [to] be employed [unless] general anesthesia is used." ER 48 at 10. Third, Petitioner supervised Andrade at all times during surgery, and *Haw. Rev. Stat.* Section 453-2 exempts from licensure nurses who perform "services rendered under the direction and control of a physician[.]"

Respondents claimed Petitioner's refund practices were improper, which is false. ER 1 at 5-6. Petitioner did not refuse any refunds, but if he had, he would have been within the law. His contracts provide for forfeited deposits when patients cancel less than 14 days before surgery, which is standard. ER 33, 34. Patient 4 cancelled nine days before and Patient 5 cancelled on the day of surgery. *Id.* "I know of no ethical rule of either the AMA or the HMA," said Dr. Hay-Roe, "that would prohibit retaining the deposits[.]" ER 44 at 5.

Respondents accused Petitioner of poor record-keeping in violation of the 1987 settlement agreement, which is false. ER 1 at 4. AAAAPSF inspector Dr. Vinnik declared, "no outpatient plastic surgery facility keeps more complete records[.]" ER 48 at 3. Dr. Rizzo called them, "very concise and down to the point, with precise evaluation on each case[.]" ER 26 at 1.

Respondents charged Petitioner with "inconsistent monitoring of oxygen saturation levels" during surgery on Patient 3, which is false. ER 1 at 4. Dr. McNamara declared:

> The blood-oxygen saturation level is clearly recorded all across each of the three pages of the anesthesia record and one page of the recovery record, with a series of 42 numbers, each in the 90s or 100, each one recording the oxygen saturation level for each quarter-hour of surgery and each quarter hour during the two hours of recovery.

ER 45 at 6. "Dr. Flowers' accusers must have been hallucinating or under anesthesia themselves." *Id.*

Respondents claimed Petitioner's "use of certain drugs indicates that he has not kept up with current practices," which is false. ER 1 at 4. "The types of medications, dosages, and combinations," said Dr. Child, "were not inappropriate, excessive, or dangerous." ER 42 at 8. "Whoever is responsible for

writing this paragraph," said Dr. Vinnik, "is totally ignorant of anesthetic practice in an outpatient plastic surgery facility." ER 48 at 10.

Respondents claimed Petitioner's "electrocardiogram strips were unreadable," which is false. ER 1 at 4. Dr. Childs called this, "untrue and irrelevant to the standard of care." ER 42 at 9. "His EKG strips are entirely readable to me," and "they are rarely [used] in outpatient plastic surgery." *Id.*

Respondents claimed Petitioner's "immediate post-operative death rate" was "unusually high." ER 1 at 4. Deaths occur after surgery; they do not prove or even suggest negligence:

> I am gravely concerned that the petition seeks to impose severe disciplinary sanctions on Dr. Flowers on the basis of, at best, a gross death rate without any regard whatever to the underlying factors.

ER 45 at 12-13 (Dr. McNamara); *see also*, ER 42 at 11 (Dr. Childs) ("it does not prove negligence[.]")

On May 13, 1994, after reviewing these uncontested affidavits, Judge Fong found, "this prosecution was brought with rather weak evidence and without a strong basis to expect to prevail." Appendix D at 16. "[D]efendants have conducted their investigation in a lackluster and unprofessional manner," declared Judge Fong, "and the tactics of their investigator are highly questionable, to say the least[.]" *Id.*

On June 7, 1996, after reviewing these uncontested affidavits, the Ninth Circuit ordered Judge Fong to file a prelminary injunction. *See* Appendix F. "We agree with the district court's analysis," wrote Judges Schroeder, Nelson and Kozinski, "[w]e disagree, however, with the court's conclusion that Dr. Flowers failed to demonstrate bad faith[.]" *Id.* at 4. "Dr. Flowers has introduced undisputed evidence that effectively negates each charge leveled against him by [Respondents]." *Id.* "[They] have no reasonable expectation of success." *Id.* "Dr. Flowers has demonstrated that [Respondents] are prosecuting him in bad faith[.]" *Id.* at 3.

ARGUMENT

A. THE SECOND DISTRICT COURT JUDGE AND THE SECOND THREE-JUDGE PANEL DISREGARDED LAW OF THE CASE.

"Inconsistency is the antithesis of the rule of law," D.C. Circuit Judge Randolph wrote recently, "the most basic principle of jurisprudence is that we must act alike in all cases of like nature." *LaShawn v. Barry*, 87 F.3d 1389, 1393 (D.C.Cir. 1996) (*en banc*), *cert. denied*, 521 U.S. 567 (1997), *citing*, *Ward v. Jones*, [1966] Q.B. 273, 294 (C.A.) (*quoting* Lord Mansfield in John Wilkes' case, *Rex v. Wilkes*, 98 Eng. Rep. 327, 335 (1770)).

Two trial judges and two appellate panels issued conflicting rulings in this case. Judges Fong, Schroeder, Nelson and Kozinski found Flowers stated a claim for injunctive relief against state officials prosecuting him in bad faith. Judges Ezra, Sneed, Tashima and Silverman dismissed identical charges for failure to state a claim.

The jurisdictional dispute – whether this Court's plurality in *Albright* regarding prosecutions without probable cause now bars injunctions of bad faith prosecutions authorized by *Younger* – has never been addressed by this Court. Regardless, the conflict reflected in these rulings has undermined, "the finality and efficiency of the judicial process[.]" *Christianson v. Colt Industries*, 486 U.S. 800, 816 (1988).

Without *en banc* review or intervening authority from this Court regarding *Albright*'s impact on *Younger*, and without finding that prior determinations of jurisdiction were clearly erroneous, one trial and three appellate judges blatantly disregarded the law of the case.

In 1988 this Court's unanimous holding in *Christianson* made clear that law of the case applies to repetitive jurisdictional claims raised before multiple panels in the same case:

> "As most commonly defined, the doctrine of the law of the case posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same

> case." *Arizona v. California*, 460 U.S. 605, 618 (1983) (dictum). This rule of practice promotes the finality and efficiency of the judicial process by "protecting against the agitation of settled issues." 1B J. Moore, J. Lucus, & T. Currier, *Moore's Federal Practice* Section 0.404[1], p. 118 (1984).

Christianson, 486 U.S. at 815-816. "That the [first panel] did not explicate its rationale is irrelevant," declared the Court:

> for the law of the case turns on whether a court previously "decide[d] upon a rule of law" – which the [first panel] necessarily did – *not on whether or how well, it explained the decision.*

486 U.S. at 816 (emphasis added); *see also, Al Tech Specialty Steel v. Allegheny International Credit*, 104 F.3d 601, 605 (3d Cir. 1997) ("applies both to matters expressly decided and to those decided by necessary implication"); *Leslie Salt v. United States*, 55 F.3d 1388, 1392 (9th Cir.), *cert. denied*, 515 U.S. 678 (1995) ("even where the first panel's holding was cryptic and somewhat ambiguous"); Wright, Miller & Cooper, *Federal Practice and Procedure*, V. 18, Section 4478 at 789 (1982) ("when a court concludes that an issue was resolved implicitly despite the lack of any explicit statement.")

The *Christianson* decision made clear that law of the case extends to jurisdictional questions. "[T]here is no reason to apply law of the case principles less rigorously," said nine justices of this Court, "[to] decisions that implicate the [court's] jurisdiction." 486 U.S. at 816 n.5. "Perpetual litigation on any issue – jurisdictional or nonjurisdictional – delays, and therefore threatens to deny, justice." *Id.; see also, LaShawn v. Barry, supra*, 87 F.3d at 1394 ("the Supreme Court specifically rejected any jurisdictional question exception to the law of the case doctrine"); *Ferreira v. Borja*, 93 F.3d 671, 674 (9th Cir. 1996), *cert. denied*, 520 U.S. 345 (1997) ("jurisdictional reconsiderations can be as wasteful as any other kind.")

Finally, while "the law of the case doctrine merely expresses the practice of courts to refuse to reopen what has been decided, not a limit to their power," the *Christianson* Court made clear that:

> courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was "clearly erroneous and would work a manifest injustice." *Arizona v. California, supra*, 460 U.S. at 618 n.8[.]

486 U.S. at 817. This rule "is a heavy deterrent to vacillation on arguable issues," the Court cautioned, "such reversals should be exceptional." 486 U.S. at 819. "The law of the case will be disregarded only when the court has a clear conviction of error." *Id., quoting, Fogel v. Chestnutt*, 668 F.2d 100, 109 (2d Cir. 1981); *see also Jeffries v. Wood*, 114 F.3d 1484, 1489 (9th Cir. 1997) (en banc) ("[t]he prior decision should be followed unless [it] is clearly erroneous[.]")

Virtually every circuit – including the Ninth – has cited and applied the *Christianson* doctrine to jurisdictional questions resolved in prior appeals in the same case:

> Surely a court that has decided it has jurisdiction is not duty-bound to entertain thereafter a series of repetitive motions to dismiss for lack of jurisdiction. Jurisdictional reconsiderations can be as wasteful as any other kind. *See Christianson*, 486 U.S. at 816-17 n.5. In this case, for example, Mafnas vigorously presented her jurisdictional argument in the prior appeal and the issue was decided against her. A decision was reached on the merits and a remand followed, as did further proceedings in the CNMI Supreme Court. The current appeal is not the place to redetermine what was decided on the prior appeal.

Ferreira v. Borja, supra, 93 F.3d at 674.[1]

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[1] *See also, LaShawn v. Barry, supra*, 87 F.3d at 1393; *South Carolina State Ports Authority v. Silver Anchor*, 23 F.3d 842, 847 (4th Cir. 1994); *Black v. Lane*, 22 F.3d 1395, 1405 (8th Cir. 1994); *U.S. v. Local 560 (I.B.T.)*, 974 F.2d 315, 330 (3rd Cir. 1992); *In re Memorial Estates*, 950 F.2d 1364, 1367 (7th Cir. 1991), *cert. denied*, 504 U.S. 986 (1992); *Trans World Airlines v. Morales*, 949 F.2d 141, 143 (5th Cir. 1991); *Parker v. King*, 935 F.2d 1174, 1177 (11th Cir. 1991).

As Judge Randolph noted in *LaShawn*, law of the case as applied to courts of appeal necessarily implicates the related doctrine of intracircuit stare decisis. "Courts of appeals sit in panels, or divisions, of not more than three judges," he wrote, "pursuant to the authority granted in 28 U.S.C. § 46(c)." 87 F.3d at 1395. "The decision of a division is the decision of the court." *Id.*, citing, *Textile Mills v. Commissioner*, 314 U.S. 326 (1941). "Were matters otherwise," declared the D. C. court en banc, "the finality of our appellate decisions would yield to constant conflicts within the circuit." *Id.* "One three-judge panel, therefore, does not have the authority to overrule another three-judge panel of the court." *Id.* "[T]he *same* issue presented a second time in the *same court* should lead to the *same result*." *Id.* at 1393 (emphasis in original). "When there are multiple appeals taken in the course of a single piece of litigation, law of the case holds that decisions rendered on the first appeal should not be revisited on later trips to the appellate court." *Id.*

Intracircuit conflicts and law of the case are matters of special concern in the Ninth Circuit, the largest of the courts of appeal. *See* 28 U.S.C. § 44. "The Ninth Circuit's 28 judges can be combined into 3276 different three-judge panels," notes a practice guide discussing intracircuit conflicts:

> The principal way that the Ninth Circuit avoids having these shifting three-judge panels issue conflicting decisions is to follow a rule of intracircuit stare decisis: panel decisions bind subsequent panels except in certain narrow situations[.]

Ulrich, Kessler and Anger, *Federal Appellate Practice Guide: Ninth Circuit*, Section 8-19 at 8-35 (1994); *see also*, Goelz and Watts, *Rutter Group Practice Guide: Federal Ninth Circuit Civil Appellate Practice*, Vol. II, Section 12:350 at 12-48.2 (1999) ("an appellate panel will not reconsider issues previously decided by another panel on the same case.")

Law of the case applied here. Judge Fong clearly found Petitioner stated a claim for injunctive relief under *Younger* in his 1994 rulings. *See* Appendices D and E. The Ninth Circuit similarly rejected Respondents' *Albright* arguments in 1996

before reaching the merits, reversing Judge Fong's abstention ruling, and ordering a preliminary injunction. *See* Appendix F.

In *Trans World Airlines v. Morales, supra*, a district judge granted a preliminary injunction in favor of four airlines against the attorneys general of 24 states, overruling objections that the airlines failed to state a claim. 949 F.2d at 143. The Fifth Circuit affirmed in *Trans World Airlines v. Mattox*, 897 F.2d 773 (5th Cir. 1990), *without addressing jurisdiction*, although challenged by the states. When the district court later entered a permanent injunction, the 24 states again appealed and again challenged jurisdiction:

> Defendants' arguments on this issue are substantially the same as made in the prior appeal. *While the prior opinion does not explicitly discuss it. the necessary assumption is that the prior panel found subject matter jurisdiction present.* Otherwise, the panel would not have reached the merits and affirmed the preliminary injunction.

949 F.2d at 144 (emphasis added). "Defendants' arguments in the prior appeal on this issue were substantially the same and the panel implicitly found subject matter jurisdiction." *Id.*

Similarly, in *U.S. v. Local 560 (I.B.T.), supra*, the Third Circuit confirmed jurisdiction adopted in a preliminary appeal:

> A trial court, in deciding whether to grant permanent relief, is not bound by its decision or the appellate court's decision about preliminary relief. The burden of proof on a moving plaintiff is different on a motion for preliminary injunction. [Citation omitted]. *When, however, a party seeking a preliminary injunction files its complaint in a procedurally defective way that would require dismissal of the suit, either because the court lacks jurisdiction or for some other reason, and the defendant raises the objection on appeal, the appellate court's rejection of that argument on appeal becomes law of the case.* Unlike merits questions, on which there is a different standard of proof in the preliminary phase and the permanent phase, the procedural question is the same in both phases. If a procedural defect would require

> dismissal of the suit, the merits are irrelevant, and the court has no power to issue any relief, preliminary or otherwise. *Because Sciarra raised these precise procedural arguments during his appeal from the preliminary injunction, by affirming and refusing to dismiss the suit we rejected these arguments, establishing the law of the case.*

974 F.2d at 330 (emphasis added). "When an appellate court decides a legal issue, that decision governs all subsequent proceedings in the same case." *Id.* at 329. "Had we found any merit in any of the three arguments just mentioned," observed the court, "we would have been compelled to vacate the preliminary injunction[.]" *Id.* "By affirming, we rejected those arguments, all actually pressed, on the merits, and our decision is the law of the case." *Id.* at 330.

"Ordinarily," acknowledges Petitioner, "a conflict between decisions rendered by different panels of the same court of appeals is not a sufficient basis for granting a writ of certiorari." Stern, R. L., *Supreme Court Practice*, Section 4.6 at 176 (6th ed. 1986). "[S]uch differences of view are deemed an intramural matter to be resolved by the court of appeals itself." *Id., quoting* Justice Harlan, "Manning the Dikes," 13 *Record of N.Y.C. Bar Ass'n* 541, 552 (1958).[2]

The primary issue here, however, is law of the case. *See Taylor v. F.D.I.C.*, 132 F.3d 753, 761 (D.C.Cir. 1997) ("[l]aw of the case, yes; law of the circuit, no.") "An appellate court cannot efficiently perform its duty to provide expeditious justice to all," said a Ninth Circuit en banc panel in a similar case:

> if a question once considered and decided were to be litigated anew in the same case upon any and every subsequent appeal.

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[2] Certiorari has been granted, however, because of intracircuit conflicts. *See, e.g., Dickinson v. Petroleum Conv. Corp.*, 338 U.S. 507, 508 (1950); *Maggio v. Zeitz*, 333 U.S. 56, 59 (1948); *Scarborough v. U.S.*, 431 U.S. 563, 567 n.4 (1977); *U.S. ex rel. Robinson v. Johnson*, 316 U.S. 649, 649 (1941) ("[i]n view of the conflict of views which has arisen among the judges of the Ninth Circuit with respect to the decision in this case.")

Jeffries v. Wood, supra, 114 F.3d at 1489. "[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Christianson v. Colt Industries, supra*, 486 U.S. at 816.

B. THIS COURT'S NARROW PLURALITY IN *ALBRIGHT* DISALLOWING CLAIMS BASED ON PROSECUTION WITHOUT PROBABLE CAUSE, DID NOT OVERRULE *YOUNGER* OR ELIMINATE FEDERAL INJUNCTIVE RELIEF AGAINST BAD FAITH PROSECUTIONS.

For nearly a hundred years, this Court has recognized a federal remedy against bad faith state prosecutions. *See Ex Parte Young*, 209 U.S. 123, 156 (1908). "[I]n cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction," said this Court in 1971, "federal injunctive relief against pending state prosecutions [is] appropriate." *Perez v. Ledesma*, 402 U.S. 82, 85 (1971). "These circumstances," said this Court in *Younger v. Harris*, 401 U.S. 37 (1971):

> sufficiently establish the kind of irreparable injury, above and beyond that associated with the defense of a single prosecution brought in good faith, that has always been considered sufficient to justify federal intervention.

401 U.S. at 48.

Contrary to Judge Ezra's 1998 ruling, bad faith is not synonymous with prosecution without probable cause. "Bad faith" describes a prosecution "brought without a reasonable expectation of obtaining a valid conviction." *See* Appendix F at 4, *quoting, Kugler v. Helfant*, 421 U.S. 117, 126 n.6 (1973); *see also, Trainor v. Hernandez*, 431 U.S. 434, 442 n.7 (1977) ("prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction"); *Gibson v. Berryhill*, 411 U.S. 564, 574 (1973) ("special circumstances suggesting bad faith"); *Cameron v. Johnson*, 390 U.S. 611, 619 (1968) ("the statute was enforced against them . . . in bad faith . . . with no expectation of obtaining convictions"); *Dombrowski v. Pfister*, 380 U.S. 479, 482 (1965) ("threats to

enforce the statutes against appellants are not made with any expectation of securing valid convictions.")

"[T]he court is persuaded," said Judge Fong in May 1994, "that this prosecution was brought with rather weak evidence and without a strong basis to expect to prevail." Appendix D at 16. "We are persuaded," declared the Ninth Circuit in June 1996, "that the RICO defendants have no reasonable expectation of success." Appendix F at 4. "Plaintiff also alleges," conceded Judge Ezra in 1998, "that Defendants violated his civil rights under 42 U.S.C. § 1983 because the petition was filed in bad faith without a reasonable chance of success." Appendix B at 3. "[A]bstention under *Younger*," acknowledged the Ninth Circuit in 1999, "was inappropriate given evidence of appellees' bad faith." Appendix A at 2.

So how did Petitioner fail to state a claim?

According to Judge Ezra, this Court's holding in *Younger* "did not create a cause of action for bad faith." Appendix A at 25. According to Judge Ezra:

> Plaintiff alleges that the type of bad faith discussed in *Younger* is sufficient to allege a federal cause of action. While *Younger*, and the cases following it, discuss bad faith, they do not create a cause of action for bad faith. Instead, they discuss whether the case before the court falls into the bad faith exception under *Younger*, and whether, based upon this, the federal court should decline to abstain, and instead allow the federal case to proceed, and stay the state proceedings.

ER 78 at 25. "[N]either the Ninth Circuit nor this court has held," said Judge Ezra, "that Plaintiff properly alleged a cause of action under § 1983 for violation of Plaintiff's constitutional right to be free from bad faith prosecution." *Id.*

Judge Ezra is wrong. In 1994 Judge Fong rejected identical arguments in Respondents' first motion to dismiss:

> Defendants rely on a recent Supreme Court case, *Albright v. Oliver* [510 U.S. 266] (1994), in which the court declined to recognize a substantive due

> process right "to be free from criminal prosecution without probable cause." The Court held that plaintiff could not sustain a § 1983 action without identifying a specific constitutional right which was infringed.

Appendix D at 7. "In the instant action, however," said Judge Fong, "plaintiff has asserted a specific constitutional right – the right to be free from bad faith prosecution[.]" *Id.* "While *Albright* stands for the principle that there is no constitutional right to be free from prosecution without probable cause," noted Judge Fong, "the constitutional right to be free from bad faith prosecutions is well established." *Id.* at 8.

Judge Fong quoted *Shaw v. Garrison*, 467 F.2d 113 (5th Cir.), *cert. denied*, 409 U.S. 1024 (1972), the seminal Fifth Circuit decision that came down shortly after *Younger*:

> a showing of bad faith or harassment is equivalent to a showing of irreparable injury for purposes of the comity restraints defined in *Younger*, because *there is a federal right to be free from bad faith prosecutions*.

Appendix D at 8, quoting, *Shaw*, 467 F.2d at 129 (emphasis by Judge Fong). Judge Fong made clear that the constitutional tort of bad faith did not begin with *Younger* or *Shaw*:

> The power of the federal courts to enjoin bad faith prosecutions predates *Shaw*. *See Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965); *Ex Parte Young*, 209 U.S. 123 (1908). Moreover, the Ninth Circuit has specifically found that federal courts have jurisdiction over a physician's § 1983 action to enjoin pending license revocation proceedings. *See Privitera v. California Board of Medical Quality Assurance*, 926 F.2d 890 (1991).

ER 55 at 9. "While there remains the question of whether the court should abstain, the court has jurisdiction over this § 1983 action on the basis of plaintiff's allegation of bad faith." *Id.*

In *Shaw*, *supra*, a man charged with involvement in the assassination of President John F. Kennedy alleged that he:

> suffered grave and irreparable injury as a result of the state perjury prosecution brought in bad faith and in furtherance of [New Orleans Prosecutor Jim] Garrison's scheme of harassment and intimidation of *Shaw*.

467 F.2d at 115. *Shaw* claimed Garrison utilized "the state's legal machinery" to prosecute him "with no hope of success in obtaining a conviction." *Shaw v. Garrison*, 328 F.Supp. 390, 392 (E.D.La. 1971). He did not claim denial of due process or equal protection, or prosecution without probable cause. *Shaw* obtained injunctive relief under *Younger* because Garrison used his office to bring a prosecution "with no hope of success." *Id.*

"Ordinarily a pending state prosecution provides the accused a fair and sufficient opportunity for vindication of federal constitutional rights," explained the same court in *Pizzolato v. Perez*, 524 F.Supp. 914 (E.D.La. 1981), "[but where] the element of bad faith or harassment exists, the above presumptions cease to operate." 524 F.Supp. at 920-921. "The effect of showing a bad faith prosecution is equivalent to a showing of irreparable injury." *Id.*

Judge Fong cited *Privitera v. California Board of Medical Quality Assurance, supra*, which recognized a physician's claim for injunctive relief under *Younger* against a bad faith state medical license revocation proceeding:

> Privitera's complaint seeks to enjoin the revocation proceeding, which he alleges represents the culmination of a pattern of unjust harassment in violation of his federal constitutional rights.

926 F.2d at 892. "Privitera's whole claim for relief," declared the Ninth Circuit, "is based on the alleged violation of his constitutional rights because of [the state's] harassing prosecution." *Id.* at 898. "[I]t is difficult to see how Privitera has failed to demonstrate *any* likelihood of success on the merits if he has in fact shown that proceeding was brought in bad faith[.]" *Id.* "The Court in *Younger* suggested that a prosecution brought in bad faith or for harassment could cause irreparable injury sufficient to justify an injunction." *Id., citing, Bishop v. State Bar of Texas*, 736 F.2d 292, 294 (5th Cir. 1984) ("irreparable

injury under *Younger* is established by a sufficient showing of retaliatory or bad faith prosecution") and *Fitzgerald v. Peek*, 636 F.2d 943, 944 (5th Cir.), *cert. denied*, 422 U.S. 916 (1981) ("injury independent of bad faith need not be established.")

By instigating a license revocation which, in their own words, "may, or may not, lead eventually to disciplinary sanctions," Respondents charged Petitioner "with no reasonable belief that a conviction will follow." *Pizzolato*, 524 F.Supp at 922; *see also, Sheridan v. Garrison*, 415 F.2d 699, 796 (5th Cir. 1969) ("using or threatening to use prosecutions regardless of their outcome"); *Westin v. McDaniel*, 760 F.Supp. 1563, 1571 (M.D.Ga.), *aff'd.* 949 F.2d 1163 (11th Cir. 1991) ("undertaken with no valid hope of conviction"); *Universal Amusement v. Texas*, 404 F.Supp. 33, 48 (S.D.Tex. 1978) ("the authorities could not believe, however, that Dexter would ultimately be convicted.")

"The harm posed by bad faith prosecution is both immediate and great." *Collins v. County of Kendall, Illinois*, 807 F.2d 95, 98 (7th Cir. 1980). "[I]t can put the plaintiffs out of business without ever convicting them of anything." *Krahm v. Graham*, 461 F.2d 703, 705 (9th Cir. 1972). "The right under *Shaw* is to be free from bad faith charges and proceedings, not to endure them until their speciousness is eventually recognized." *Bishop, supra*, 736 F.2d at 294.

According to Respondents, "*Shaw* is superseded by *Albright*." ER 56 at 6. Judge Ezra agreed:

> The right to be free from bad faith or malicious prosecution, while important, can be protected through other procedural safeguards. It is not generally the type of right which has historically been offered protection through the substantive due process clause.

Appendix B at 11. "Plaintiff's claim here is a claim for malicious or wrongful prosecution," said Judge Ezra, "substantive due process may not furnish the constitutional peg on which to hang a tort for malicious prosecution." *Id.* at 13 n.2, quoting *Albright*.

Judge Ezra mischaracterized Petitioner's claims.

First, he treated bad faith under *Younger* interchangeably with malicious prosecution under *Albright*, which misconstrued the complaint and misinterpreted *Younger* and *Albright*.

Second, Judge Ezra "ignores the issue of bad faith." Appendix D at 8. Neither *Albright* nor any cases citing this four-page, four-justice plurality have discussed, limited, or analyzed "the constitutional right to be free from bad faith prosecutions." If "*Shaw* is superseded by *Albright*," then why didn't *Albright* discuss *Younger*, *Shaw*, or bad faith prosecutions filed without hope of obtaining a conviction?

Third, Judge Ezra cited no authority for his *ipse dixit* holding that "the right to be free of bad faith" can "be protected through other available procedural safeguards." *Id.* at 11. The cases suggest the opposite. *Younger* and *Dombrowski* protect federal plaintiffs from trial "where there is no reasonable hope of obtaining a conviction." *Perez*. 401 U.S. at 118 n.11. "The threat itself is a constitutional deprivation," explained Justice Brennan in *Perez*, "since it subjects a person to a burden of criminal defense which he should not have to bear." *Id.* at 118.

Finally, the 1999 Ninth Circuit panel declares:

> The district court was correct in concluding that Flowers's [sic] claim of bad faith prosecution was insufficient to state a claim under § 1983. He had not alleged a violation of procedural due process. And his allegations of bad faith prosecution did not fall within the ambit if the right to substantive due process. In analyzing executive, as opposed to legislative, action in the context of substantive due process, "only the most egregious official conduct can be said to be arbitrary in the constitutional sense." *County of Sacramento v. Lewis*, [523 U.S. 833, 846] (1998).

Appendix A at 2. "None of Flowers's [sic] allegations rises [sic] to the level of egregious conduct," concludes the panel, "against which the Due Process Clause provides protection." *Id.*[3]

The 1996 panel 1) rejected identical arguments, 2) found, "a harassing motivation irrespective of the evidence," 3) declared, "[a] prosecution is brought in bad faith if it is brought without a reasonable expectation of obtaining a valid conviction," and 4) said, "[w]e are persuaded that [Respondents] have no reasonable expectation of success." Appendix F at 4.

This Court should reinstate the earlier opinion.

CONCLUSION

Petitioner respectfully requests certiorari, vacate the April 6, 1999, opinion, reverse the February 13, 1998, dismissal, restore the preliminary injunction, and remand for trial.

Respectfully submitted,

PETER VAN NAME ESSER
Counsel of Record
DAVID L. TURK
Suite 400, Seven Waterfront Plaza
500 Ala Moana Boulevard
Honolulu, Hawaii 96813
(808) 538-3636

Attorneys for Petitioner
Robert S. Flowers, M.D.

OCTOBER 1999.

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[3] The panel's reliance on *Lewis* is misplaced. *Lewis*, like *Albright*, is not a bad faith case. *See* 523 U.S. at 855 ("there is no reason to believe that they were tainted by an improper or malicious motive.") The "shock the conscience" test described in *Lewis* does not apply when state officials act in "bad faith."

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT S. FLOWERS, M.D., Plaintiff-Appellant, v. SHERRIE T. SEKI, CYNTHIA S. NAKAMURA, individually and in their official capacities as attorneys for the Regulated Industries Complaints Office, Department of Consumer Affairs, State of Hawaii; CLIFFORD K. HIGA, in his official capacity as Director of the Department of Commerce and Consumer Affairs, State of Hawaii, SHARON ON LENG, in her official capacity as Complaints and Enforcement Officer of the Regulated Industries Complaints Office, Department of Consumer Affairs, State of Hawaii and JOHN DOES 1-20; IRENE NAKANO, OWEN TAMAMOTO; individually and in their official capacity as attorneys for the Regulated Industries	No. 98-15440 D.C. No. CV-94-00190-DAE MEMORANDUM* (Filed Apr. 6, 1999)

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Complaints Office, Department of Consumer Affairs, State of Hawaii; EARL HARADA individually and in his official capacity as investigator for the Regulated Industries Complaints Office, Department of Consumer Affairs, State of Hawaii; KATHRYN MATAYOSHI; individually and in her official capacity as Director of the Department of Commerce and Consumer Affairs, State of Hawaii,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Hawaii
David A. Ezra, District Judge, Presiding

Argued and Submitted January 12, 1999
San Francisco, California

Before SNEED, TASHIMA, and SILVERMAN, Circuit Judges.

Robert S. Flowers, M.D., appeals the district court's dismissal of his amended complaint alleging that the appellees violated 42 U.S.C. § 1983 by investigating him in bad faith in medical license revocation proceedings. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Neither this court's prior memorandum decision nor the district court's prior rulings constituted law of the case and precluded the dismissal of Flowers's amended complaint. In the previous appeal, a panel of this court

held only that abstention under *Younger v. Harris*, 401 U.S. 37 (1971), was inappropriate given evidence of the appellees' bad faith. The panel, however, did not explicitly or implicitly find that Flowers alleged a sufficient injury to state a claim under section 1983 or even consider the issue. Moreover, although the district court previously had stated in general terms that the right to be free from bad faith prosecution was protected by the Constitution, it had not determined that Flowers's specific cause of action was cognizable under section 1983. Thus, the law of the case doctrine did not bar consideration of the sufficiency of Flowers's amended complaint. *See Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 715 (9th Cir.1990).

The district court was correct in concluding that Flowers's claim of bad faith prosecution was insufficient to state a claim under section 1983. He had not alleged a violation of procedural due process. And his allegations of bad faith prosecution did not fall within the ambit of the right to substantive due process. In analyzing executive, as opposed to legislative, action in the context of substantive due process, "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.' " *County of Sacramento v. Lewis*, 118 S.Ct. 1708, 1716 (1998) (*quoting Collins v. Harker Heights*, 503 U.S. 115, 129 (1992)). The Supreme Court has explained that "for half a century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience." *Id.* at 1717. None of Flowers's allegations rises to the level of egregious conduct against which the Due Process Clause provides protection.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

ROBERT S. FLOWERS, M.D., Plaintiff, vs. SHERRIE T. SEKI, CYNTHIA S. NAKAMURA, IRENE M. NAKANO, OWEN K. TAMAMOTO, individually and in their official capacities as attorneys for the Regulated Industries Complaint Office, Department of Consumer Affairs, State of Hawaii; EARL HARADA, individually and in his official capacities as investigator for the Regulated Industries Complaint Office, Department of Consumer Affairs, State of Hawaii; KATHRYN S. MATAYOSHI, in her official capacity as Director of the Department of Commerce and Consumer Affairs, State of Hawaii; and SHARON ON LENG, in her official capacity as Complaints and Enforcement Officer of the Regulated Industries Complaints Office, Department of Consumer Affairs, State of Hawaii; and JOHN DOES 1-20, Defendants.	)	CV. NO. 94-00190DAE (Filed Feb. 13, 1998)

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

The court heard Defendants' Motion on January 5, 1998. David L. Turk, Esq., appeared at the hearing on behalf of Plaintiff; Kenneth S. Robbins, Esq., and Deputy Attorney General David A. Webber, appeared at the hearing on behalf of Defendants. After reviewing the motion and the supporting and opposing memoranda, the court GRANTS Defendants' Motion to Dismiss for failure to state a claim.

BACKGROUND

This case has a tortured and extended history. Because the instant motion is dispositive, and this court has issued previous orders cited by the parties, and relevant hereto, a discussion in some detail of the background of the case is necessary.

This case arises from a Hawaii state license revocation proceeding charging Plaintiff, a plastic surgeon, with gross negligence and manifest incapacity under Hawaii Revised Statutes Chapter 453. Defendants are officials and employees of the State of Hawaii who investigate and prosecute complaints against those with licenses issued by the State of Hawaii. Specifically, Defendants are employees in some capacity of the Department of Commerce and Consumer Affairs ("DCCA"). The controversy in the instant proceeding is based upon an investigation and petition filed by the attorneys at the Regulated Industries Complaints Office ("RICO"), a division of DCCA. Each of the Defendants is alleged to be in some

manner involved in the proceedings pending against Plaintiff.

Defendants Seki, Nakano and Tamamoto are staff attorneys employed by RICO. Defendant Nakamura is a supervising attorney employed by RICO, and Defendant On Leng is the Complaints and Enforcement Officer, and heads RICO. Defendant Harada is an investigator employed by DCCA, working in the RICO division. And finally, Defendant Matayoshi heads DCCA, and as Director she presides over RICO. While the Board of Medical Examiners is the State agency that adjudicates the complaints over physicians within the State of Hawaii, the investigative as well as charging authority for the complaints is delegated to RICO.

The first RICO investigation into Plaintiff's professional activities was the result of earlier charges lodged against Plaintiff. After some discussion, Plaintiff and RICO entered into a Settlement Agreement in 1988. The Settlement Agreement restricted Plaintiff's practice and required RICO monitoring and individualized reporting. After the 1988 Settlement, more complaints were filed against Plaintiff, and a new investigation was commenced in February 1991. On December 17, 1993, Defendant Seki filed a petition in the Office of Administrative Hearings, so that a hearing could be conducted on the new complaints. On March 9, 1994, Plaintiff filed the above-entitled action, requesting declaratory and injunctive relief, as well as damages. Plaintiff also alleges that Defendants violated his civil rights under 42 U.S.C. § 1983 because the petition was investigated and filed in bad faith without a reasonable expectation of success. Plaintiff contends that Defendants conspired to violate his constitutional

rights, and that the supervising Defendants were deliberately indifferent to such violations. Plaintiff asserts state law claims of intentional and negligent infliction of emotional distress, negligent supervision, and defamation.

On the same day that Plaintiff filed this complaint, he filed a preliminary injunction requesting emergency relief. The late District Court Judge Harold M. Fong determined that abstention pursuant to *Younger v. Harris*, 401 U.S. 37 (1971), was appropriate, and denied the Motion for Preliminary Injunction staying the federal proceedings pending the outcome of the state administrative action.

The Ninth Circuit reversed Judge Fong's Order, vacated the stay, and instructed the district court to enter a preliminary injunction. In its memorandum opinion, the Ninth Circuit found that Defendants were prosecuting Plaintiff in bad faith, and that abstention under *Younger* was therefore inappropriate. Pursuant to the Ninth Circuit's opinion, this court granted Plaintiff's Motion for Preliminary Injunction.

On October 30, 1997, Defendants filed the instant Motion to Dismiss or for Summary Judgment alleging Plaintiff failed to state a federal claim, and various defenses to Plaintiff's claims. While Defendants focus on whether they are entitled to immunity, Defendants also claim that Plaintiff failed to state a federal cause of action. Plaintiff filed his Opposition on December 18, 1997, and Defendants replied on December 23, 1997.

STANDARD OF REVIEW

A motion to dismiss will be granted where the plaintiff fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). For the purposes of a 12(b)(6) motion, "[r]eview is limited to the contents of the complaint." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 755 (9th Cir. 1994).

A complaint should not be dismissed "unless it appears beyond doubt that plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." *Buckey v. County of Los Angeles*, 968 F.2d 791, 794 (9th Cir. 1992) (quoting *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1989)) (further citations omitted). All allegations of material fact are taken as true and construed in the light most favorable to the plaintiff. *Id.* Civil rights complaints are to be liberally construed. *Id.* (citing *Gobel v. Maricopa County*, 867 F.2d 1201, 1203 (9th Cir. 1989)).

To the extent, however, that "matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment." Fed. R. Civ. P. 12(b); *Del Monte Dunes at Monterey, Ltd. v. Monterey*, 920 F.2d 1496, 1507 (9th Cir. 1990).

DISCUSSION

I. Rule 56(f) Continuance.

Plaintiff requested a continuance under Federal Rule of Civil Procedure 56(f). Plaintiff contends that he was unable to depose Defendants Seki and Nakamura regarding their roles in the Flowers investigation, or the scope

of their duties at RICO. Plaintiff's Opp. at 40. Based upon the following discussion, the court finds that additional discovery will not cure the deficiencies present in Plaintiff's federal claim or assist Plaintiff in defending against this motion.

II. 42 U.S.C. § 1983.

Plaintiff alleges a cause of action under 42 U.S.C. § 1983, against each of the Defendants. The court will consider this cause of action first as it forms the basis for federal jurisdiction.[1] Plaintiff contends that he is entitled to damages from Defendants Seki, Nakamura, Tamamoto, and Harada under § 1983 "for instituting and/or maintaining an ongoing bad faith prosecution and investigation in violation of Dr. Flowers' constitutional rights under the privileges and immunities clause of the United States Constitution and the Fifth and Fourteenth Amendments to the United States Constitution." First Amended Complaint at ¶ 201. Plaintiff also alleges that Defendants Nakamura, Nakano, Tamamoto, and Harada conspired to violate his constitutional rights. *Id.* at ¶ 204. Plaintiff asserts that Defendants Nakamura and Matayoshi, were deliberately indifferent, and knew or should have known, that "Defendants Seki, Nakano, Tamamoto, and Harada

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[1] The court notes that the majority of the moving and opposing papers focus on immunity, however, the court finds that the more significant issue is whether Plaintiff has in fact stated a federal claim. The court addressed such a query to both parties at oral argument, and indicated its concern at that time that a federal claim may not be alleged on these facts. The court again concentrates on this inquiry in this Order.

were engaged and continue to engage in a bad faith prosecution and investigation of Dr. Flowers," and failed to properly supervise Defendants Seki, Nakano, Tamamoto, and Harada, thus adopting or ratifying their actions. First Amended Complaint at ¶ 207. Section 1983 is the basis for each of Plaintiff's federal claims. Hence, to remain in federal court, Plaintiff must properly allege a violation of 42 U.S.C. § 1983 upon which relief can be granted.

To assert a claim under 42 U.S.C. § 1983, Plaintiff must allege that he was deprived of a specific constitutional right by Defendants, who are unquestionably state actors. *Siegert v. Gilley*, 500 U.S. 226, 132 (1991). In determining jurisdiction, this court previously characterized Plaintiff's constitutional right in this case as a substantive due process right, and stated that "Plaintiff's relief depends upon establishing the applicability and validity of his claims under the Fourteenth Amendment." January 30, 1997 Order Adopting Magistrate's Findings and Recommendations that Plaintiff's Motion to have the Appellate Court's Finding of Bad Faith to be Law of the Case be Granted in Part and Denied in Part at 4-5. At this time the court is compelled to review Plaintiff's federal claim again to determine if it can survive a motion to dismiss. Thus, it being clear that Defendants are state actors, the court will focus its discussion on whether Plaintiff has alleged a deprivation of a specific constitutional right.

A. Substantive Due Process.

At the outset it must be noted that it is difficult to determine what Plaintiff asserts as the basis for his

substantive due process right, and thus his § 1983 claim. It appears Plaintiff is asserting a federal constitutional right to be free from bad faith prosecution. Plaintiff makes a conclusory allegation that he "need not show independent harm from this license revocation proceeding because he has a constitutional right to be free from bad faith investigation and prosecution." Plaintiff's Opp. at 32. In a footnote Plaintiff insists that "Judge Harold Fong made this ruling in his May 13, 1994, [sic] order denying Dr. Flowers' motion for preliminary injunction . . . ("[i]f plaintiff successfully establishes that the presecution [sic] itself is proceeding in bad faith, then the due process safeguards of the prosecution are of no avail[.]")." *Id.*

Plaintiff analogizes his cause of action to that in *Mishler v. Nevada State Board of Medical Examiners*, 896 F.2d 408 (9th Cir. 1990). In *Mishler* the Ninth Circuit held that the plaintiff stated a cause of action under 42 U.S.C. § 1983 for deprivation of his property without due process. *Mishler*, 896 F.2d 408, 409 (1990). The Ninth Circuit there found that "an essential element of a professional license, part of the property comprising the license, is the right to have one's good standing in the profession certified by the agency that has issued the license." *Id.* at 410. Plaintiff compares his constitutional claims to those of the plaintiff in *Mishler*, stating that Plaintiff has "a cloud over his license [as a result of the license revocation proceedings] that has reduced his practice and denied him hospital privileges." Plaintiff's Opp. at 33. However, more importantly, Plaintiff distinguishes his claim from that of the plaintiff in *Mishler* by stating:

> In *Mishler* the physician claimed only a denial of due process, which requires deprivation of a protected interest for an action under Section 1983. . . . In contrast, Dr. Flowers has charged Defendants with bad faith, and filing a Petition "without a reasonable expectation of obtaining a valid conviction."

Plaintiff's Opp. at 34. Thus, Plaintiff is not asserting a deprivation of property, and is instead claiming that he has a constitutional right to be free from bad faith prosecution. Defendants contest the existence of such a right, and Plaintiff has failed to point to any case which establishes its existence as a substantive due process right in the Ninth Circuit. On a motion to dismiss, the court must consider whether such a right exists, and whether Plaintiff has stated a claim upon which relief can be granted for deprivation of that right.

Substantive due process refers to certain actions that the government may not engage in, no matter how much process is afforded. *Blaylock v. Schwinden*, 862 F.2d 1352, 1354 (9th Cir. 1988). The United States Supreme Court has found "certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause." *Moore v. City of East Cleveland*, 431 U.S. 494, 502-03 (1977). Some of the rights given protection as substantive due process include freedom of choice with respect to child bearing, parental rights, rights as to child rearing and living arrangements. *See Id.; Roe v. Wade*, 410 U.S. 113 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972). Limits on substantive due process come from

"respect for the teachings of history [and], solid recognition of the basic values that underlie our society." *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J. concurring.). While the standards established to identify a substantive due process right are somewhat unclear, it is well settled that official conduct that "offend[s] those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses[,]" amounts to a substantive due process violation. *Rutherford v. City of Berkeley*, 780 F.2d 1444, 1446 (9th Cir. 1986) (quoting *Rochin v. California*, 342 U.S. 165, 169 (1952)).

Essentially, Plaintiff alleges that the right to be free from bad faith prosecution is a right guaranteed by substantive due process, and a right actionable through § 1983. The court disagrees. The Supreme Court indicated that the "[s]ubstantive due process clause has at times been a treacherous field." *Moore*, 431 U.S. at 502. The Court has recognized that rights guaranteed by the substantive due process clause represent "a realm of personal liberty which the government may not enter." *Armendariz v. Penman*, 75 F.3d 1311, 1319 (9th Cir. 1996) (internal quotations and citations omitted). "There are risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights." *Id.* In *Blaylock*, the Ninth Circuit declined to provide protection under the substantive due process clause to the plaintiffs' claim for failure to properly administer the Montana Workers' Compensation Act. 862 F.2d 1352, 1354 (9th Cir. 1988). The Ninth Circuit there found that the plaintiffs

had not alleged a substantive due process right. *Id.* Plaintiff here has also failed to allege a right protected by the substantive due process clause. The right to be free from bad faith or malicious prosecution, while important, can be protected through other available procedural safeguards. It is not generally the type of right which has historically been offered protection through the substantive due process clause.

In *Johnson v. Barker,* 799 F.2d 1396, 1398 (9th Cir. 1986), the plaintiffs were given criminal citations as they hiked down Mt. St. Helens during its eruption in 1984. The plaintiffs were alleged to have been in a restricted zone on the mountain. *Id.* The Sheriff that issued the citation was in a helicopter, and refused to give the plaintiffs a ride down the mountain. *Id.* As a result of this the plaintiffs were forced to spend another night on the mountain, and the volcano erupted during that night. *Id.* A helicopter had to come up the mountain to get them the next day, as they were unable to get down of their own accord. *Id.* Counsel for the plaintiffs notified the Skamania County Deputy Prosecutor that the plaintiffs were never within the restricted zone on the mountain. *Id.* The Sheriff's office still pushed for prosecution and after months of delay, the charges were dismissed. The plaintiffs were then charged with attempting to violate the executive order which restricted certain parts of the mountain. *Id.* No trial was held on these charges as a Writ of Prohibition was entered by the Washington Superior Court on the ground that the plaintiffs were not granted the right to a speedy trial. *Id.*

The plaintiffs later filed a civil rights action, alleging malicious prosecution of constitutional proportions on several basis [sic]. *Id.* at 1399-1400. The plaintiffs asserted:

> First, that the prosecutors hesitated to drop the initial charges, even after they were discovered to be baseless, because the sheriff wanted to prosecute appellants for "political" reasons. Second, that the prosecutors tried to make a case against appellants by arguing that they had entered a broader restricted zone, when in fact that zone had not been sufficiently publicized. Third, that after finally dismissing the first charges, the prosecutors filed a new complaint against appellants charging them with "attempting" to enter the known restricted areas. Fourth, that prosecutor Hansen misrepresented to appellants' counsel that the Army helicopter pilot would testify at trial, when in fact Hansen knew the witness would be unavailable. Finally, that the prosecutors sought and received a continuance based on that unavailability and subsequently failed to bring appellants to trial before the Writ of Prohibition was granted.

Id. at 1400. The Ninth Circuit found that even given these facts, the conduct by the government officials was not "so egregious as to 'shock the conscience.' " *Id.* (quoting *Rochin v. California*, 342 U.S. 165, 169 (1952)). Thus, the court there held that the actions taken by the government officials did not violate substantive due process. *Id.*

The action taken by the government officials in *Johnson* is similar to the activity that Plaintiff alleges to have occurred here. Plaintiff asserts that Defendants continued to investigate and prosecute the proceedings against him even though they were aware that the allegations had no

merit. While the court agrees that some of Defendants' activities are questionable, as in *Johnson*, they are not so egregious as to shock the conscience, and do not rise to the level of a substantive due process violation.

Given the history of substantive due process, and the Supreme Court's reluctance to extend protection through the substantive due process clause, while the court is concerned about the actions allegedly taken against Plaintiff, the court finds that Plaintiff cannot receive protection through the substantive due process clause.[2]

B. Procedural Due Process.

As discussed earlier, Plaintiff has gone to great lengths to explain that he has not asserted a violation of his procedural due process rights as a basis for his § 1983 claim, and has instead asserted "the constitutional right to be free from bad faith prosecution." Plaintiff's Opp. at 31. In response to Defendants' assertions that Plaintiff has failed to demonstrate deprivation of a protected interest, Plaintiff explains that he

> has provided uncontested evidence that he was – and is being – harmed by Defendants' bad faith investigation and prosecution. Second,

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[2] Furthermore, the United States Supreme Court in *Albright v. Oliver*, 510 U.S. 266, 270-71 n.4 (1994), held that "substantive due process may not furnish the constitutional peg on which to hang" a tort for malicious prosecution. *See Perez-Ruiz v. Guillen*, 25 F.3d 40, 42 (1st Cir. 1994) (finding that the Supreme Court in *Albright* "virtually . . . foreclose[d] reliance on substantive due process as the basis for a viable malicious prosecution claim under section 1983").

> regardless, Dr. Flowers need not show independent harm from this license revocation proceeding because he has a constitutional right to be free from bad faith investigation and prosecution.

Plaintiff's Opp. at 32. Nonetheless, Plaintiff alleges that he was unable to accept an offer for full professorship from a University in Kentucky, that the offer has since been withdrawn, and that he was therefore harmed by Defendants' actions. *Id.* As mentioned earlier, Plaintiff also discusses the existence of a "cloud over his license that has reduced his practice and denied him hospital privileges." *Id.* at 33. However, Plaintiff never specifically avers that as a result of the state administrative proceedings and the bad faith prosecution, he was denied his property without procedural due process. Thus, every indication from Plaintiff in his Amended Complaint and his opposition in this proceeding, is that he is not alleging a procedural due process violation.[3]

However, the court notes that Plaintiff does not make his allegations entirely clear. Plaintiff contradicts himself in some sense as he explains the relationship of the facts in *Mishler* to his case. He initially asserts that "Dr. Flowers claims just such a deprivation[,]" as the plaintiff

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[3] The court recognizes that in pro se cases the court is required to consider a plaintiff's complaint liberally, and often times aid the plaintiff in the proper assertion of his rights. However, where, as here, a plaintiff is represented by competent counsel and has chosen to pursue a particular avenue for his claim, federal courts cannot and should not recharacterize the plaintiff's claim, thus becoming a second advocate for the plaintiff.

in *Mishler,* then he later contrasts his claims with that of the plaintiff in *Mishler* and states: "In contrast [to the deprivation alleged in *Mishler*], Dr. Flowers has charged Defendants with bad faith." Plaintiff's Opp. at 33-34. As a result of Plaintiff's inconsistency, the court must consider whether Plaintiff has in fact alleged facts to support a similar deprivation as the plaintiff in *Mishler.*

In *Mishler,* the Ninth Circuit held that because the State of Nevada delayed, for over seventeen months, certifying to the Ohio Medical Board that the plaintiff held a valid license to practice medicine in the State of Nevada, the plaintiff could properly allege a claim for malicious taking of his property by the Nevada Medical Board. *Mishler,* 896 F.2d at 410-11. The property that the plaintiff was deprived of in *Mishler* was the "right to have one's good standing in the profession certified by the agency that has issued the license." *Id.* at 410. Plaintiff asserts that in his case RICO's pending investigation against him barred him from obtaining a Kentucky medical license, and thus employment in Kentucky. Plaintiff's Opp. at 33. Yet, Plaintiff does not allege that the Kentucky Medical Board ever contacted the State of Hawaii to obtain certification. In fact, Plaintiff states that *he* wrote the State of Hawaii alerting RICO about his offer of employment in Kentucky, and explaining to RICO that the pending investigation would bar him from obtaining a Kentucky license. *Id.* In essence, Plaintiff wanted the pending investigation dismissed, not a certification of his good standing. His claim is, therefore, not the same as the Plaintiff in *Mishler,* as the State of Hawaii licensing agency did not deprive him of his property interest in having his good standing to practice medicine certified

by the State licensing agency. If the State of Hawaii had refused to certify Plaintiff's good standing to the Kentucky Medical Board, then Plaintiff would be able to make the same claim as the plaintiff in *Mishler*. On these facts, as pled by Plaintiff, Plaintiff has not alleged a protected property interest which was deprived without due process of law. RICO's decision not to dismiss the civil proceeding pending against Plaintiff in response to his letter, does not amount to a deprivation of a constitutionally protected property interest in the Ninth Circuit.

Furthermore, malicious prosecution itself does not constitute a due process violation unless the plaintiff demonstrates that the malicious prosecution was done for the purpose of denying the plaintiff equal protection of the laws, or depriving the plaintiff of another constitutional right. *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1189 (9th Cir. 1995). The Ninth Circuit, when discussing malicious prosecution, is referring to prosecution in the criminal context. While Plaintiff's claim here is a claim for malicious or wrongful prosecution in the civil or administrative context, it is nonetheless akin to a claim for malicious criminal prosecution, and thus, the court looks to the cases regarding malicious prosecution for guidance.[4]

For example, in *Cline v. Brusett*, 661 F.2d 108, 112 (9th Cir. 1981), the Ninth Circuit explained that while the

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[4] As pointed out by Defendants, the Restatement of Torts 2d, discusses the civil counterpart to malicious prosecution, that being wrongful institution of civil proceedings. Defendants' Motion at 15-16.

general rule is that malicious prosecution "does not constitute a deprivation of life, liberty or property without due process of law . . . [i]n this case an interest in liberty was impaired under circumstances in which appellant's allegations strongly suggest that a post-deprivation hearing under state law would not afford him constitutionally required due process." In *Cline*, the plaintiff filed a complaint pursuant to 42 U.S.C. § 1983, alleging that the defendants conspired to have the plaintiff convicted of "groundless charges," and deny him his right to fair trials by bribing witnesses, and presenting false evidence and perjured testimony to the juries. *Cline*, 661 F.2d at 110. The plaintiff was eventually convicted with the use of the false evidence and perjured testimony, and was sent to prison. The court found that he was deprived of his liberty without due process, and thus that the malicious prosecution was conducted with the intent to deny the plaintiff his constitutional right to liberty. *Id.* at 112. The plaintiff's claim for malicious prosecution fell within the noted exception, and therefore could serve as the basis for his claim under 42 U.S.C. § 1983. *Id.* at 112. Plaintiff's case here is distinguishable from the circumstances in *Cline*. The plaintiff in *Cline* asserted a deprivation of a specific constitutional right, whereas Plaintiff in this case has failed to do so.

Since, as discussed above, Plaintiff has not asserted a denial of a constitutional right, he "must bring his common law tort claim [malicious prosecution] . . . within the scope of section 1983, under the exception for a malicious prosecution intended to deprive someone of the equal protection of the laws." *Id.* at 561. As noted, in his Amended Complaint Plaintiff alleges a cause of action

under 42 U.S.C. § 1983 "for instituting and/or maintaining an ongoing bad faith prosecution and investigation in violation of Dr. Flowers' constitutional rights under the privileges and immunities clause of the United States Constitution and the Fifth and Fourteenth Amendments to the United States Constitution." Amended Complaint at ¶201. Plaintiff does not specifically allege that the administrative proceedings were wrongfully instituted with the intent to deprive him of his right to equal protection of the laws. However, because Plaintiff alleged a violation of the Fourteenth Amendment, which encompasses the Equal Protection Clause, the court will assume that Plaintiff is making this legal argument.

In order to properly assert an equal protection violation, Plaintiff must show that similarly-situated classes received different treatment. *Christian Gospel Church v. City and County of San Francisco,* 896 F.2d 1221, 1225 (9th Cir. 1990). Therefore, "[a]n equal protection argument requires the existence of at least two classifications of persons which are treated differently under the law." *Id.,* (quoting *United States v. Horton,* 601 F.2d 319, 323-4 (7th Cir. 1979)). Merely treating two groups differently does not necessarily violate the Equal Protection Clause. *Bonner v. Lewis,* 857 F.2d 559, 565 (9th Cir. 1988). The record before the court is devoid of factual allegations that suggest that the civil proceeding was instituted against Plaintiff in an attempt to deprive him, based upon his membership in a certain class, equal protection of the laws. Thus, Plaintiff failed to bring his common law tort claim for bad faith prosecution into the scope of a claim under 42 U.S.C. § 1983, by alleging that the bad faith

proceedings were instituted against him in an attempt to deprive him of equal protection of the laws.

Even construing Plaintiff's Amended Complaint in the light most favorable to him, Plaintiff has not stated a federal cause of action under 42 U.S.C. § 1983. Upon careful review of the Amended Complaint and Plaintiff's Opposition to this motion, the court is unable to point to any facts or allegations that satisfy the pleading requirements for a cause of action for bad faith prosecution of an administrative proceeding. As noted, Plaintiff has failed to allege that the civil administrative proceedings were instituted as an attempt to deny him equal protection of the laws, or any other constitutional right, such as his life, liberty or property. While Plaintiff indicates that his professional reputation has been injured as a result of the pending proceedings, the Supreme Court has indicated that "injury to reputation by itself [is] . . . not a "liberty" interested protected under the Fourteenth Amendment." *Siegert v. Gilley*, 500 U.S. 226, 233 (1991).[5] Thus, given the above discussion, Plaintiff has not stated a claim for a procedural due process violation based upon bad faith institution of civil proceedings. The court recognizes, that Plaintiff is not restrained from bringing a state law claim for wrongful institution of civil proceedings in state court. Thus, process is available at the state level in order to protect Plaintiff's interests.

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[5] The United States Supreme Court, in *Paul v. Davis*, 424 U.S. 693, 708-09 (1976), rejected the plaintiff's contention that the actions of state officials stigmatized his reputation and impaired his future employment opportunities, thus depriving him of a constitutionally protected liberty interest.

C. Constitutional Tort of Malicious Prosecution.

The United State Supreme Court recognized, in *Albright v. Oliver*, 510 U.S. 266, 271 n.4 (1994), the existence of a diversity of opinion regarding whether a claim for malicious prosecution is independently actionable under § 1983. In *Albright*, the Court indicated that substantive due process would not afford the plaintiff relief for malicious prosecution, and the Court instead looked to the most analogous constitutional amendment, which in that case was the Fourth Amendment. *Id.* at 274. As discussed in *Albright*, some circuits allow a cause of action under 42 U.S.C. § 1983, for malicious prosecution, essentially making such a claim a constitutional tort. *See Lee v. Mihalich*, 847 F.2d 66, 70 (3d Cir. 1988) (holding the elements for constitutional tort of malicious prosecution under § 1983 are the same as for the common law tort); *Wheeler v. Cosden Oil and Chemical Co.*, 734 F.2d 254, 258 (5th Cir. 1984) ("there is a federal right to be free from bad faith prosecutions.").

The Ninth Circuit, however, has not recognized malicious prosecution as a constitutional tort. In fact, the Ninth Circuit has clearly held, "the general rule is that a claim of malicious prosecution is not cognizable under 42 U.S.C. § 1983 if process is available within the state judicial system to provide a remedy." *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1031 (9th Cir. 1985) (en banc)); *see also Karim-Panahi v. Los Angeles Police Department*, 839 F.2d 621, 624 (9th Cir. 1988). The Ninth Circuit however has recognized an exception to the general rule if a malicious prosecution is "conducted with the intent to deprive a person of equal protection of the laws or is otherwise

intended to subject a person to a denial of constitutional rights." *Id.* at 562 (internal quotations and citations omitted). Essentially, this is the same exception discussed above in the portion of this Order regarding procedural due process. Significantly, Plaintiff has failed to allege the requisite constitutional deprivations, either of equal protection, or a separate constitutional right, and thus has not stated a federal claim for bad faith prosecution to serve as the basis for a claim under 42 U.S.C. § 1983.

The court has reviewed the Ninth Circuit's earlier decision in this matter several times. This is an unfortunate case. On appeal the State of Hawaii took a position which was uncalled for and out of line. In its decision, the Ninth Circuit aptly noted concern about the State's position and the possible improprieties of the state administrative proceedings. This court is also wary of the tactics taken in the investigation against Plaintiff. However, when the court takes a careful, reasoned view of the allegations and assertions in this case, it simply cannot find that Plaintiff has stated a federal claim.[6] Plaintiff's allegations, as pled in his Complaint and explained in his Opposition, do not constitute a claim for malicious prosecution that would rise over and above the general state law tort, to a constitutional deprivation.

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[6] This court is aware that the Ninth Circuit Panel was understandably incensed by the nature and tone of the arguments made by the then Deputy Attorney General handling this case. But this court, and any subsequent Ninth Circuit Panel must step back from that unfortunate episode, and review the facts and law of this case dispassionately.

D. Privileges and Immunities.

Plaintiff indicates that Defendants' actions violated the Privileges and Immunities clause of the Constitution. *See* Complaint at ¶201. Nevertheless, based upon the facts presented to the court, Plaintiff cannot rely on the Privileges and Immunities clause of the Constitution as a predicate to his § 1983 cause of action. Discrimination on the basis of out-of-state residency is a necessary element for a claim under the Privileges and Immunities Clause. *Giannini v. Real*, 911 F.2d 354, 357 (9th Cir. 1990). Plaintiff fails to assert that he was discriminated against or treated differently because of the status of his residency. The court is at a loss to understand, and Plaintiff has failed to demonstrate, the relationship that the Privileges and Immunities Clause has to his § 1983 claim.

III. Younger Abstention and Bad Faith.

In his opposition, to support his allegations that there is a federal constitutional right to be free from bad faith prosecution, Plaintiff relies on *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny. The Supreme Court, in *Younger*, articulated a doctrine of abstention, establishing that a federal court should decline to enjoin state proceedings out of concerns for comity and federalism. *Younger* abstention embodies "a strong federal policy against federal-court interference with pending state judicial proceedings, absent extraordinary circumstances." *Middlesex County Ethics Comm. v. Garden State Bar Association*, 457 U.S. 423, 431 (1982).

In determining whether to abstain under *Younger*, the Ninth Circuit applies the three-pronged test outlined by

the United States Supreme Court in *Middlesex*: abstention is appropriate where (1) the state proceedings are ongoing; (2) the proceedings implicate important state interests; and (3) the state proceedings provide an adequate opportunity to raise federal questions. *Fresh International Corp. v. Agricultural Labor Relations Board*, 805 F.2d 1353 (9th Cir. 1987) (*citing Middlesex*, 457 U.S. at 432).

There is, however, a recognized exception to *Younger* abstention for state proceedings brought in bad faith or for purposes of harassment. *Younger*, 401 U.S. at 49. Bad faith has been defined in this context as any "prosecution [that] has been brought without a reasonable expectation of obtaining a valid conviction." *Kugler v. Helfant*, 421 U.S. 117, 126 n.6 (1993). If the state official prosecutes with knowledge that there is no lawful basis for the prosecution, then the prosecution is in bad faith. *See Nobby Lobby, Inc. v. City of Dallas*, 970 F.2d 82, 88 (5th Cir. 1992) (full awareness that prosecution was invalid on the basis of judicial decision satisfied bad faith requirement). It is this exception to *Younger* that Plaintiff appears to rely on as a basis for his federal right to be free from bad faith prosecution.

Upon further review of Plaintiff's opposition, the court notes that Plaintiff alleges that the type of bad faith discussed in *Younger* is sufficient to allege a federal cause of action. While *Younger*, and the cases following it, discuss bad faith, they do not create a cause of action for bad faith. Instead, they discuss whether the case before the court falls into the bad faith exception under *Younger*, and whether, based upon this, the federal court should decline to abstain, and instead allow the federal case to proceed, and stay the state proceedings. Here, the Ninth

Circuit clearly found that the state court proceeding fell within the bad faith exception to *Younger* abstention, however, neither the Ninth Circuit, nor this court has held that Plaintiff properly alleged a cause of action under § 1983 for violation of Plaintiff's constitutional right to be free from bad faith prosecution. As it stands today, without more, such a constitutional tort does not exist in the Ninth Circuit.

IV. This Court's January 30, 1997 Order.

Plaintiff continually refers to this court's January 30, 1997 Order Adopting Magistrate's Findings and Recommendation that Plaintiff's Motion to have the Appellate Court's Finding of Bad Faith Determined to be Law of the Case be Granted in Part and Denied in Part. In that Order, this court discussed whether it had subject matter jurisdiction over Plaintiff's complaint. The court explained that Defendants objected to the Magistrate's Findings and Recommendations because "Defendants claim that this court does not have subject matter jurisdiction over this case if the court finds that Defendants are entitled to immunity." January 30, 1997 Order at 4. The court further addressed Defendants' claim that Plaintiff failed to identify the deprivation of a specific constitutional right. *Id.* Significantly, the court, at that time, was not reviewing the Amended Complaint on a motion to dismiss, and was merely determining whether to adopt the Magistrate's Findings and Recommendations regarding jurisdiction. Now, the court has a proper motion to dismiss before it, and is given the opportunity to completely review the entire Amended Complaint to determine if a claim under 42 U.S.C. § 1983 is properly stated. After careful review

and reflection, the court holds that Plaintiff has not demonstrated and properly supported his allegations under 42 U.S.C. § 1983, and based upon the facts before the court, Plaintiff cannot do so. Accordingly, the court is compelled to dismiss Plaintiff's claim brought under 42 U.S.C. § 1983 for failure to state a cause of action.[7]

V. State Law Claims.

As the court has dismissed Plaintiff's only federal causes of action, the remaining claims are solely based upon state law. The court exercised supplemental jurisdiction over the state law claims. Given that federal jurisdiction is now lacking, the court, in its discretion, DISMISSES Plaintiff's remaining state law claims WITHOUT PREJUDICE.

VI. Immunity for Claims Brought Under 42 U.S.C. § 1983.

The court notes that even if Plaintiff had properly stated a federal claim under 42 U.S.C. § 1983, Defendants are protected by either absolute or qualified immunity at least as to the claims for damages alleged against them in their individual capacities.

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[7] Plaintiff also claims that Defendants conspired to violate his constitutional rights, and that Defendant supervisors were deliberately indifferent to the activity taken against Plaintiff that allegedly deprived him of his constitutional rights. Since the court has found that Plaintiff did not properly allege a constitutional deprivation, Plaintiff has also failed to state a claim under these causes of action.

Defendants each claim either absolute or qualified immunity for their actions which allegedly resulted in deprivation of Plaintiff's constitutional rights. While immunity applies to those claims for monetary damages asserted against Defendants in their individual capacities, immunity does not protect Defendants from claims made against them for injunctive relief in their official capacities.

A. Absolute Immunity.

Defendants Seki and Nakamura assert that they are entitled to absolute prosecutorial immunity regarding the preparation and filing of the Petition. Defendants Seki, Nakamura, Tamamoto, and Nakano also insist that they are entitled to absolute prosecutorial immunity regarding their work after the filing of the Petition in preparation for the presentation of the case at a contested hearing before the Office of Administrative Hearings.

For actions brought under 42 U.S.C. § 1983, the United States Supreme Court has been hesitant to recognize absolute immunity for state actors. Although the language of § 1983 purports to offer no immunities,[8] the

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[8] 42 U.S.C. § 1983 sets forth a civil cause of action for deprivation of constitutional rights. The statute provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress." 42 U.S.C. § 1983 (West 1994).

courts have found that § 1983 "is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976). Thus, the United States Supreme Court in *Imbler*, found "the threat of § 1983 suits would undermine performance of [a prosecutor's] . . . duties," and recognized the need for absolute immunity for prosecutors in suits brought under 42 U.S.C. § 1983. *Id.* at 424.

However, the Court has made clear that not every action taken by a prosecutor is entitled to absolute immunity. Absolute prosecutorial immunity is not conferred on individuals based merely on their status as prosecutors. To determine if absolute immunity applies, the court has to look at "the nature of the function performed, not the identity of the actor who performed it." *Forrester v. White*, 484 U.S. 219, 229 (1988). The official seeking the protection of absolute immunity "bears the burden of showing that such immunity is justified for the function in question." *Burns v. Reed*, 500 U.S. 478, 486 (1991). The United States Supreme Court has made clear that the common law rationale behind absolute prosecutorial immunity offers protection only for those activities that are "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430; *see also Kalina v. Fletcher*, ___ U.S. ___, 118 S. Ct. 502, 1997 WL 756635 (1997) (Finding a prosecutor's conduct in connection with the preparation and filing of charging document is protected by absolute immunity, however, her actions in executing certification for determination of probable cause were too far removed from her role as an advocate in judicial proceedings and were not entitled to absolute immunity.)

The Supreme Court explained in *Buckley v. Fitzsimmons*, 509 U.S. 259, 273-74 (1993),

> There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand. When a prosecutor performs the investigative functions normally performed by a detective or police officer it is "neither appropriate nor justified that, for the same act, immunity should protect the one and not the other." . . . Thus, if a prosecutor plans and executes a raid on suspected weapons cache, he "has no greater claim to complete immunity than activities of police officers allegedly acting under his direction."

(citations omitted). Therefore, a prosecutor's actions as an advocate will be protected by absolute immunity, while actions that are not closely associated with judicial proceedings are guaranteed only qualified immunity. When a prosecutor herself conducts an investigation to determine if a suspect can be arrested, absolute immunity may not protect this activity. *Buckley*, 509 U.S. at 275. It is clear that even if, at a later date, any evidence turned up by the prosecutor is used before a grand jury for example, the investigatory work is not "retroactively transformed[ed] . . . from the administrative into the prosecutorial." *Id.* at 276. It is now clear that "[a] prosecutor may not shield his investigative work with the aegis of absolute immunity merely because . . . that work may be retrospectively described as 'preparation' for a possible trial." *Id.* Admittedly, the line is not clearly delineated,

however, the individual claiming absolute prosecutorial immunity must demonstrate the activity performed was not administrative or investigative in nature, and was instead closely associated with the judicial proceedings and his role as an advocate.[9]

Finally, in *Butz v. Eonomou* [sic], 438 U.S. 478, 515 (1978), the Supreme Court held that agency officials "performing certain functions analogous to those of a prosecutor should be able to claim absolute immunity with respect to such acts." The Court reasoned that agency officials acting in such a capacity are often vested with similar discretion as prosecutors in determining whether to proceed with an administrative case. *Id.* at 516; *see also Demery v. Kupperman*, 735 F.2d 1139 (9th Cir. 1984) (holding that a deputy attorney general should be granted absolute immunity with regard to administrative disciplinary proceeding against a doctor).

To bolster their argument for absolute immunity, Defendants urge that "[n]o competent attorney would consider proceeding with a case without personally evaluating the documentary evidence and potential testimony of witnesses . . . both as part of preparing a civil or criminal complaint, and as part of preparing for hearings or discovery subsequent to initiation of proceedings." Defendants' Motion at 9-10. Defendants explain that each

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[9] The Hawaii Supreme Court has also followed this distinction. In *Reed v. City and County of Honolulu*, 76 Haw. 219, 873 P.2d 98 (1994), the Hawaii Supreme Court limited the application of absolute prosecutorial immunity in § 1983 actions to quasi-judicial acts taken by county prosecutors.

of the attorneys – Seki, Nakamura, Nakano, and Tamamoto – "were intimately involved in the evaluation and preparation of the administrative petition (Seki and Nakamura) or in the post-petition development of the administrative case for presentation at a contested hearing (Seki, succeeded by Tamamoto, assisted early in 1996 for a few months by Nakano, and supervised by Nakamura)." *Id.* at 10. Plaintiff disagrees with this blanket characterization of Defendants' work.

The difficulty here is that Plaintiff is not complaining about particular actions taken by Defendants. Rather he is complaining about the entire process, from the investigation to the filing of the Petition, and the other actions taken to date.

At the outset, the court finds that it is clear that any work performed by Defendants Seki, Tamamoto, Nakamura, and Nakano in the actual preparation and filing of the initial Petition on December 17, 1993, and the Amended Petition in 1994, is protected by absolute immunity. The actions taken to prepare and file the Petition are closely associated with judicial proceedings, and are the functional equivalent of a prosecutor filing criminal charges against a defendant. Likewise, the activity performed by Defendants in the preparation of the case for a hearing on the merits is also protected by absolute prosecutorial immunity.

The court recognizes, however, that there are actions taken by Defendants Seki, Nakamura, Tamamoto, and Nakano that are not so easily defined as activities that would be protected by absolute immunity. The line between investigatory/administrative work, and the

work done in preparation for a prosecutor's case is not as black and white as most would like. Because of this, instead of deciding the difficult question of absolute immunity for the remainder of the activities, the court will assume, as Plaintiff argues, that the activities do not fit squarely within the realm of absolute immunity and instead analyze them under the doctrine of qualified immunity.

B. Qualified Immunity.

The doctrine of qualified immunity provides that "state and local officials are entitled to qualified immunity if 'their conduct [did] not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Manhattan Beach Police Officers Assoc., Inc. v. City of Manhattan*, 881 F.2d 816, 818 (9th Cir. 1989) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). " 'The contours of the right must be sufficiently clear that a reasonable officer would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, . . . but it is to say that in the light of the pre-existing law the unlawfulness must be apparent.' " *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). The doctrine protects state and local officials from their exercise of poor judgment, and only fails to protect those that are "plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 343 (1986).

The Ninth Circuit has articulated a three-step analysis to determine whether an official is entitled to qualified immunity. The court must consider:

> (1) whether the plaintiff has identified a specific federal statutory or constitutional right that has been allegedly violated, (2) whether that right as so clearly established as to alert a reasonable official to its parameters and (3) whether a reasonable officer could have believed his or her conduct was lawful.

Sweaney v. Ada County, Idaho, 119 F.3d 1385, 1388 (9th Cir. 1997). Initially, the plaintiff has the burden of proof to show that the right was clearly established. *Id.* Furthermore, the right must be " 'clearly established at the time of the challenged actions.' " *Id.* (quoting *Mitchell v. Forsyth,* 472 U.S. 511, 528 (1985)). The plaintiff " 'must show that the particular facts of his case support a claim of clearly established right.' " *Id.* at 1389 (quoting *Backlund v. Barnhart,* 778 F.2d 1386, 1389 (9th Cir. 1985)).

As explained above, Plaintiff has not asserted a specific constitutional or statutory right that is clearly established, and thus Plaintiff cannot overcome the first step in the analysis of qualified immunity. Thus, because Plaintiff has not demonstrated that the right alleged by him was clearly established in the Ninth Circuit at the time of the acts complained of, Defendants enjoy the protection of qualified immunity as to Plaintiff's claims under 42 U.S.C. § 1983.

Consequently, even if the court did not find that Plaintiff failed to state a federal claim, claims against Defendants in their individual capacity under 42 U.S.C.

§ 1983, and would be barred by either absolute or qualified immunity.

CONCLUSION

For the reasons stated above, the court GRANTS Defendants' Motion to Dismiss Plaintiff's claims under 42 U.S.C. § 1983 for failure to state a claim, and DISMISSES Plaintiff's state law claims WITHOUT PREJUDICE.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, FEB 13 1998.

/s/ David Alan Ezra
DAVID ALAN EZRA
UNITED STATES DISTRICT JUDGE

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT S. FLOWERS, M.D., Plaintiff-Appellant, v. SHERRIE T. SEKI, CYNTHIA S. NAKAMURA, individually and in their official capacities as attorneys for the Regulated Industries Complaints Office, Department of Consumer Affairs, State of Hawaii; CLIFFORD K. HIGA, in his official capacity as Director of the Department of Commerce and Consumer Affairs, State of Hawaii, SHARON ON LENG, in her official capacity as Complaints and Enforcement Officer of the Regulated Industries Complaints Office, Department of Consumer Affairs, State of Hawaii and JOHN DOES 1-20; IRENE NAKANO, OWEN TAMAMOTO; individually and in their official capacity as attorney for the Regulated Industries Complaints Office, Department of Consumer Affairs, State of Hawaii; EARL HARADA individually and in his official capacity as investigator for the Regulated Industries Complaints Office, Department of Consumer Affairs, State of Hawaii;	No. 98-15440 D.C. No. CV-94-00190-DAE ORDER (Filed Jul. 9, 1999)

KATHRYN MATAYOSHI; individually and in her official capacity as Director of the Department of Commerce and Consumer Affairs, State of Hawaii,

Defendants-Appellees.

Before: SNEED, TASHIMA, AND SILVERMAN, Circuit Judges.

The panel has voted to deny applicant's petition for rehearing. Judges Tashima and Silverman have voted to reject the suggestion for rehearing en banc, and Judge Sneed so recommended.

The full court has been advised of the suggestion for rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc.

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

ROBERT S. FLOWERS, M.D., Plaintiff, vs. SHERRIE T. SEKI and CYNTHIA S. NAKAMURA, individually and in their official capacities as attorneys for the Regulated Industries Complaints Office, Department of Consumer Affairs, State of Hawaii; CLIFFORD K. HIGA, in his official capacity as Director of the Department of Commerce and Consumer Affairs, State of Hawaii; SHARON ON LENG, in her official capacity as Complaints and Enforcement Officer of the Regulated Industries Complaints Office, Department of Consumer Affairs, State of Hawaii; and JOHN DOES 1-20, Defendants.	CIV. NO. 94-00190 HMF (Filed May 13, 1994)

ORDER DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

On April 11, 1994, the court heard arguments on plaintiff Robert S. Flowers, M.D.'s ("Flowers") motion for preliminary injunction. Flowers alleges that state disciplinary proceedings against him are proceeding in bad faith.

BACKGROUND

Plaintiff Robert S. Flowers, M.D., a plastic surgeon, brought this action seeking to enjoin defendants Sherrie T. Seki, Cynthia S. Nakamura, Clifford K. Higa, and Sharon On Leng from proceeding with administrative disciplinary prosecutions pending against him. Flowers alleges that these proceedings are being prosecuted against him in bad faith and without cause in violation of his constitutional right to due process.

Defendants made little attempt to refute the central factual allegations of Flowers in their pleadings or at the hearing. The court is thus left with little choice but to accept the facts as alleged by plaintiff. Flowers alleges that the original complaint upon which the ongoing prosecution is based was filed by a disgruntled former employee who embezzled from Flowers, was fired, and filed a complaint with the Regulated Industries Complaints Office ("RICO") in retaliation. Flowers responded by writing to the State Board of Medical Examiners ("the Board") in March 1993. The Board forwarded the letter to RICO, whose duty it was to investigate the merit of the charges against Flowers.

RICO initiated an investigation into the Flowers complaint. Flowers alleges that the RICO investigator spread slanderous lies to potential witnesses from the outset. (Pl. Exh. 18). Flowers asserts that the investigator made the statements without any factual basis in order to influence witnesses and destroy his reputation.

Counsel for plaintiff asserts that defendant Sherrie T. Seki, who was conducting the investigation, broke her promise to him to proceed without bias and to give him a reasonable opportunity to provide information in response to any potential charges before she prepared a petition. Seki apparently breached this promise by failing to contact him until she had prepared and filed a disciplinary petition in December 1993. Seki contacted Flowers to offer a settlement proposal requiring a five-year suspension of his license, permanent limitations on his future right to practice in Hawaii, and admissions of guilt on the charges against him. Despite her original promise, Seki refused to withdraw the complaint without prejudice to her right to re-file it.

Flowers asserts that the charges against him were brought for improper purposes. He suggests that he is a scapegoat for political pressure upon RICO to discipline doctors[1] because two of his patients had died and he had previously settled a disciplinary action with RICO.

Defendant Sherrie T. Seki filed the disciplinary petition against Flowers with the Hearings Officer of RICO

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[1] Flowers relies on several Hawaii newspaper articles detailing the rarity of disciplinary proceedings against doctors in Hawaii.

on December 17, 1993. The petition seeks action against Flowers' medical license: revocation, suspension, or limitation, as well as other sanctions. The charges against Flowers are that: (1) his treatment of two patients resulted in their deaths; (2) he violated a previous agreement with the Board by having a patient stay overnight at his clinic in January 1992; (3) he kept inadequate records; (4) his use of drugs has not kept up with current practices; (5) he used an unlicensed nurse anesthetist; and (6) he wrongfully withheld funds from patients who had canceled their surgeries. Flowers asserts that all charges are without merit.

Flowers asserts that the contents of the RICO petition are false, misleading, and irrelevant. Several physicians have reviewed the petition and other relevant documents and have condemned the petition as meritless. These physicians are: (1) Dr. Victor Hay-Roe, a plastic surgeon at Honolulu Medical Group, (2) Dr. Judson McNamara, a thoracic surgeon who chairs the surgery department of the University of Hawaii medical school, (3) Dr. Robert Childs, an anesthesiologist who chairs the Peer Review Committee of the Honolulu County Medical Society, and (4) Dr. Charles Vinnik, a plastic surgeon who chairs the Standards Committee of the American Association for the Accreditation of Ambulatory Plastic Surgery Facilities. All of these physicians have submitted affidavits stating that, after review of the disciplinary petition, they conclude that it is replete with false allegations and that the charges against plaintiff are without merit. Defendants make no effort to rebut the statements of these physicians.

Flowers addresses the merits of the charges against him in detail. The most serious charges against Flowers are that his treatment caused the death of two patients. In the first case, a patient died as a result of an overdose of pain medication. The petition implies that Flowers failed to instruct the patient and her husband – for both of whom English was a second language – properly with regard to usage of the medication. A previous RICO investigation ended with a finding of "insufficient evidence" of malpractice. Flowers asserts that both patient and husband spoke fluent English and that the County Coroner found evidence of a possible homicide by the patient's husband.

In the second case, a patient died of a sudden-onset cardiac disease which the attending cardiologist found had no known etiology. The attending cardiologist stated that the death was not caused by Flowers' treatment or medication of the patient.

With regard to the impropriety of his overnight patient, Flowers acknowledges that the patient stayed overnight at his clinic but disputes that this violated any conditions on his right to practice. Moreover, Flowers asserts that he was acting in the patient's best interests at the time, an assertion supported by other doctors.

Flowers disputes the charge that he is guilty of inadequate record-keeping in violation of the 1988 settlement agreement. Flowers points out that the plastic surgeon appointed by the Board to monitor Flowers' record-keeping after the 1988 settlement agreement over an eighteen month period reported no defects in Flowers' record-keeping and, in a final evaluation, stated that Flowers'

records "could have been used as a model for teaching cases to Plastic Surgical Residents."

Flowers disputes that his drug use has not kept up with current practices. Dr. Vinnik, who submitted an affidavit in support of Flowers, refutes this charge, stating that it ignores the potential danger in newer, faster-acting anesthetics.

Flowers acknowledges that he did have an unlicensed nurse anesthetist working for him during two operations in January 1992, but states that he had employed her as a licensed nurse-anesthetist for over twenty years and did not know that she had put her license on inactive status when she moved to the mainland several months before. Flowers thus asserts that he lacks intent to have "aided and abetted" an unlicensed practitioner.

With regard to the two patients from whom he is accused of wrongfully withholding funds, Flowers asserts that, in both cases, he did not learn that either wanted a refund until long after their cancellations. He promptly refunded their money after learning that they desired refunds.

Flowers has been a practicing plastic surgeon in Hawaii for over two decades. He asserts that the investigation has damaged his professional reputation in the community and resulted in the retraction of at least one offer of employment (by the University of Louisville

Medical School) and the evaporation of other potential offers.[2]

Defendants argue that the court lacks jurisdiction and, even if the court had jurisdiction, the court should abstain. Defendants make no attempt to rebut any of plaintiff's central factual allegations. The court is puzzled by defendants' nearly lackadaisical advocacy. In any event, the questions before the court are (1) whether the court has jurisdiction over this matter; (2) if so, whether the court should nonetheless abstain from ruling on the motion at this time in light of the ongoing state proceedings; and (3) if not, whether plaintiff has established prima facie entitlement to injunctive relief.

DISCUSSION

I. THE COURT HAS JURISDICTION OVER THIS MATTER BASED ON THE ALLEGATION OF BAD FAITH.

Defendants assert that the court lacks jurisdiction over this matter because plaintiff asserts no federal right which would give rise to jurisdiction. Defendants rely on a recent Supreme Court case, *Albright v. Oliver*, ___ U.S. ___, 114 S. Ct. 807 (1994), in which the Court declined to recognize a substantive due process right "to be free from criminal prosecution except upon probable cause." The Court held that plaintiff could not sustain a § 1983 action without identifying a specific constitutional right which

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[2] According to counsel for United States, he requested that Seki prepare to discuss the issues before the Kentucky medical board (so that Flowers' application could proceed). Seki delayed, and, ultimately, the offer was withdrawn in late 1993.

was infringed. *Id.* at 811-12 (citing *Graham v. Connor,* 490 U.S. 386, 394 (1989)). In the instant action, however, plaintiff has asserted a specific constitutional right – the right to be free from bad faith prosecution – which the state is allegedly infringing.

Defendants assert that plaintiff is being afforded due process in the ongoing state administrative proceeding and that the proceeding may or may not lead to eventual sanctions.[3] Before a final administrative order is entered, defendants assert, plaintiff will have been afforded adversarial proceedings before a disinterested officer and the Board as well as rights of appeal. Plaintiff's license to practice will not be effected unless and until the state meets the burden upon it in this context.

Defendants' arguments ignore the issue of bad faith. If plaintiff successfully establishes that the prosecution itself is proceeding in bad faith, then the due process safeguards of the prosecution are of no avail to plaintiff's immediate and ongoing injury. While *Albright* stands for the principle that there is no constitutional right to be free from prosecution without good cause, the constitutional right to be free from bad faith prosecutions is well established. In *Shaw v. Garrison,* 467 F.2d 113, 120 (5th

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[3] Defendants also point out that plaintiff has no constitutionally protected interest in reputation. *See Paul v. Davis,* 424 U.S. 693, 712 (1976) (holding that defamatory publications do not implicate a due process property or liberty interest); *see also Siegert v. Gilley,* 500 U.S. 226 (1991) (holding that no constitutional right was implicated where the malicious, defamatory statements of a government official substantially hindered plaintiff's efforts to obtain other employment).

Cir.), *cert. denied*, 409 U.S 1024 (1972), the Fifth Circuit held that

> a showing of bad faith or harassment is equivalent to a showing of irreparable injury for purposes of the comity restraints defined in *Younger*, because *there is a federal right to be free from bad faith prosecutions.*

The power of federal courts to enjoin bad faith prosecutions predates *Shaw*. *See Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965); *Ex parte Young*, 209 U.S. 123 (1908). Moreover, the Ninth Circuit has specifically found that federal courts have jurisdiction over a physician's § 1983 action to enjoin pending license revocation proceedings. *See Privitera v. California Board of Medical Quality Assur.*, 926 F.2d 890 (1991). In *Privitera*, a physician sought injunctive relief against pending state license revocation proceedings under 42 U.S.C. § 1983. *Id.* at 891. The district court denied the injunction but stayed the action pending resolution of state issues in state court because those issues "would either moot the constitutional issues or impact their disposition." The Ninth Circuit reversed, holding that the district court improperly abstained, and remanded for consideration on the merits of injunctive relief. In spite of the ongoing proceedings (and the seeming lack of exhaustion of state administrative remedies), the court held that jurisdiction was appropriate.

While there remains the question of whether the court should abstain and stay (or dismiss) these proceedings, it is clear that the court has jurisdiction over this § 1983 action on the basis of plaintiff's allegation of bad faith.

II. ABSTENTION IS INAPPROPRIATE IF THE COURT FINDS EVIDENCE OF BAD FAITH.

In *Privitera*, the Ninth Circuit held that abstention was inappropriate where plaintiff sought injunctive relief against ongoing state medical license revocation proceedings. 926 F.2d at 896. *Privitera* establishes that *Pullman* and *Colorado River* abstention are inappropriate under the circumstances of this case.[4] The only remaining question

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[4] Under *Railroad Comm'n v. Pullman*, 312 U.S. 496, 501 (1941), a federal court will use its discretion to abstain from deciding constitutional claims if resolution of state law issues might mean that "the constitutional issue does not arise." *Pullman* abstention is intended to "avoid both unnecessary adjudication of federal questions and 'needless friction with state policies. . . . ' " *Hawaiian Housing Auth. v. Midkiff*, 467 U.S. 229, 238 (1984). *Pullman* abstention is appropriate if (1) the complaint involves "a sensitive area of social policy" which federal courts ought to avoid where possible, (2) a "definitive ruling on the state issue" could make constitutional adjudication unnecessary by terminating the controversy; and (3) the possibly determinative issue of state law is doubtful. *See Privitera*, 926 F.2d at 895 (citing *Canton v. Spokane School Dist. No. 81*, 498 F.2d 840, 845 (9th Cir. 1974)).

In *Privitera*, the Ninth Circuit held that whether the physician was harassed did not touch a sensitive area of social policy. 926 F.2d at 895. The resolution of the physician's claim would have no effect on any social policy, the court ruled, because it would affect only the parties to the case. *Id.* Additionally, the court held that *Pullman* abstention was inappropriate because the general principles of *Pullman* – allowing states to interpret their statutes to avoid unconstitutionality – was not implicated by a "highly individualized" claim based on personal harassment. *Id.* at 896. In light of *Privitera*, *Pullman* abstention is inappropriate in the instant case.

Under *Colorado River Water Conservation Dist. v. United*

which *Privitera* leaves unanswered is when *Younger* abstention is appropriate.

Under *Younger v. Harris*, 401 U.S. 37 (1971), a federal court will decline to enjoin state proceedings out of concerns for comity and federalism. Although *Younger* initially applied only to state criminal proceedings, it has been extended by the Supreme Court to civil and administrative proceedings as well. *See Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423 (1982) (civil judicial proceedings); *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986) (state administrative proceedings).

There is, however, a recognized exception to *Younger* abstention for state proceedings brought in bad faith or for harassment. *Younger*, 401 U.S. at 49. Because the *Privitera* court found evidence of bad faith, it found that *Younger* abstention was inappropriate. Similarly, if the court finds that plaintiff makes a sufficient showing of bad faith or harassment in the case at bar, then this exception should be invoked and *Younger* abstention is inappropriate.

States, 424 U.S. 800, 817 (1976), a federal court will abstain in order to avoid duplicative litigation which is "unrelated to considerations of proper constitutional adjudication." *Colorado River* abstention is appropriate where there are concurrent state proceedings and the interests of efficient judicial administration dictate staying the federal action. In the instant case, it appears that state proceedings have not yet advanced to a stage where wasted judicial resources are an issue. *See Herrington v. County of Sonoma*, 706 F.2d 938, 939-40 (9th Cir. 1983). *Colorado River* abstention is thus inappropriate.

If, alternatively, the court finds insufficient evidence of bad faith, then *Younger* abstention would be appropriate. As noted above, the purpose of *Younger* abstention is to further the policies of comity and federalism. These policies are implicated in the instant case: state administrative proceedings in this matter have been pending since the December 1993 filing of the RICO petition for disciplinary action against plaintiff's medical license. In light of the "strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances," abstention would be appropriate in these circumstances. *Middlesex County Ethics Comm'n v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982).

There are three requirements for *Younger* abstention to be appropriate: (1) ongoing state judicial or administrative state proceedings, (2) important state interests are implicated, and (3) state proceedings provide a reasonable opportunity to raise federal questions. *Mission Oaks Mobile Home Park v. City of Hollister*, 989 F.2d 359, 360-61 (9th Cir. 1993). All three prongs of this test are met in the instant case: (1) there are, obviously, ongoing state administrative proceedings, (2) the state has an interest (of profound importance, it asserts) in regulating the medical profession and protecting the public, and (3) plaintiff may raise any relevant issue in the course of these proceedings or on appeal from those proceedings.

The court must thus decide the issue of whether bad faith exists in this case. If the court finds that there is insufficient evidence of bad faith, then *Younger* abstention is appropriate.

III. PLAINTIFF HAS NOT ESTABLISHED HIS RIGHT TO A PRELIMINARY INJUNCTION.

A. Preliminary Injunction Standard.

As the Supreme Court has stated,

> [i]t goes without saying that an injunction is an equitable remedy. It 'is not a remedy which issues as of course,' or 'to restrain an act the injurious consequences of which are merely trifling.' An injunction should issue only where the intervention of a court of equity 'is essential in order effectually to protect property rights against injuries otherwise irremediable.

Weinberger v. Romero-Barcelo, 454 U.S. 305, 311, 102 S. Ct. 1798, 1803, 72 L.Ed.2d 91 (1982) (citations omitted).

The court will not consider granting a preliminary injunction unless two things are shown: an irreparable injury and the inadequacy of legal remedies. *Id.* The court then engages in a balancing test:

> Where plaintiff and defendant present competing claims of injury, the traditional function of equity has been to arrive at a 'nice adjustment and reconciliation' between the competing claims. In such cases, the court '*balances the conveniences of the parties and possible injuries to them* according as they may be affected by granting or withholding of the injunction.'

Id. (citations omitted) (emphasis added).

The Ninth Circuit has held that a party seeking preliminary injunctive relief must satisfy one of two balancing tests. Under the first test, a court may issue a preliminary injunction if it finds that:

> (1) the [moving party] will suffer irreparable injury if injunctive relief is not granted, (2) the [moving party] will probably prevail on the merits, (3) in balancing the equities, the [non-moving party] will not be harmed more than [the moving party] is helped by the injunction, and (4) granting the injunction is in the public interest.

Martin v. International Olympic Committee, 740 F.2d 670, 674-75 (9th Cir. 1984); *Los Angeles Memorial Coliseum Commission v. National Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980).

Alternatively, the court may issue a preliminary injunction if the moving party demonstrates *either* "the probability of success on the merits and the possibility of irreparable injury *or* that serious questions are raised and the balance of hardships tips sharply in his favor." *Half Moon Bay Fishermans' Marketing Ass'n v. Carlucci*, 857 F.2d 505, 507 (9th Cir. 1988) (citing *Hoopa Valley Tribe v. Christie*, 812 F.2d 1097, 1102 (9th Cir. 1986)) (emphasis added). The critical element in determining the test to be applied is the relative hardship to the parties. *Half Moon* at 507 (citing *Benda v. Grand Lodge of Int'l Ass'n of Machinists*, 584 F.2d 308, 315 (9th Cir. 1978), *cert. dismissed*, 441 U.S. 937, 99 S. Ct. 2065 (1979)). "If the balance of harm tips decidedly toward the plaintiff, then the plaintiff need not show as robust a likelihood of success on the merits as when the balance tips less decidedly." *Id.*

To obtain injunctive relief, injury or threat of injury must be shown to be real and immediate, not merely conjectural or hypothetical. *See Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 557 (9th Cir. 1990) (*citing Los*

Angeles v. Lyons, 461 U.S. 95, 101-02, 103 S. Ct. 1660, 1664-65 (1983)). A showing of a few instances of violations by defendants, without a showing of a deliberate policy of such violations, does not provide a basis for equitable relief. *Id.* at 557-58. However, injunctive relief is available to combat a persistent pattern of misconduct violative of plaintiff's rights. *Id.* at 558.

B. Bad Faith.

The success of this motion hinges on bad faith. *Younger* suggests that a finding of bad faith will satisfy the irreparable injury requirement. In *Younger*, the Court found no irreparable injury *because* the criminal prosecution had been brought in good faith. 401 U.S. at 49-50. The Court held that an injury must be " 'both great and immediate' " to be irreparable; "[c]ertain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered 'irreparable' in the special legal sense of that word." *Id.* at 46. In other words, the injuries which a defendant being prosecuted faces do not rise to the level of being irreparable if the hearing is proceeding in good faith. Bad faith, then, is the *sine qua non* of irreparable injury in this context.

Bad faith has been defined in this context as any "prosecution [that] has been brought without a reasonable expectation of obtaining a valid conviction." *Kugler v. Helfant*, 421 U.S. 117, 126 n.6 (1993). If the state official prosecutes with knowledge that there is no lawful basis for the prosecution, then the prosecution is in bad faith. *See Nobby Lobby, Inc. v. City of Dallas*, 970 F.2d 82, 88 (9th

Cir. 1991) (full awareness that prosecution was invalid on the basis of judicial decision satisfied bad faith requirement). Bad faith generally takes one of four guises: (1) retaliation for the exercise of constitutional rights; (2) institution of a serious prosecution for a relatively minor offense, when selective prosecution can be found; (3) prosecution without a reasonable basis of obtaining a conviction; and (4) prosecution motivated by the prosecutor's desire for personal or political gain. *See Pizzolato v. Perez*, 524 F. Supp. 914, 921 (E.D. La. 1981).

Under the facts asserted by plaintiff, the court is persuaded that this prosecution was brought with rather weak evidence, and without a strong basis to expect to prevail. Defendants have made little effort to rebut plaintiff's allegations, choosing instead to assert that they do not rise to the level of bad faith. Plaintiff has presented evidence that (1) he is a distinguished and renowned plastic surgeon; (2) that defendant Seki, the attorney in charge of the RICO investigation, breached a promise to allow plaintiff to respond to potential charges before a disciplinary petition was prepared; (3) that Mr. Harada, the Board investigator, conducted the investigation in a biased and slanderous manner; (4) that the petition against plaintiff is replete with false allegations and factual inaccuracies; (5) that the charges brought against plaintiff are without merit; and (6) that leading physicians in the community, after review of the petition and the underlying facts, roundly condemn the petition as unwarranted.

Even if plaintiff may have alleged convincing facts to establish that he should prevail in the state proceedings

against him by a showing that defendants have conducted their investigation in a lackluster and unprofessional manner and the tactics of their investigator are highly questionable, to say the least, the court is unpersuaded that plaintiff has established that defendants are proceeding in bad faith. The state does have some evidence to support its case against plaintiff. The fact that plaintiff can explain away this evidence in a manner which justifies his conduct does not negate the existence of the evidence itself. Even though the case against plaintiff may appear to be weak, the court is unable to conclude that this amounts to bad faith. Accordingly, the court must abstain under *Younger*.

CONCLUSION

For the reasons given, the court DENIES plaintiff's motion for a preliminary injunction. This denial is without prejudice to plaintiff's right to renew this motion if more evidence of bad faith emerges.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, MAY 13 1994

/s/ Harold M. Fong
UNITED STATES
DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

ROBERT S. FLOWERS, M.D., Plaintiff, vs. SHERRIE T. SEKI and CYNTHIA S. NAKAMURA, individually and in their official capacities as attorneys for the Regulated Industries Complaints Office, Department of Consumer Affairs, State of Hawaii; CLIFFORD K. HIGA, in his official capacity as Director of the Department of Commerce and Consumer Affairs, State of Hawaii; SHARON ON LENG, in her official capacity as Complaints and Enforcement Officer of the Regulated Industries Complaints Office, Department of Consumer Affairs, State of Hawaii; and JOHN DOES 1-20, Defendants.	)	CIV. NO. 94-00190 HMF (Filed May 19, 1999)

ORDER STAYING PROCEEDINGS

On May 16, 1994, the court heard arguments on a motion to dismiss plaintiff's complaint filed by defendants Sherrie T. Seki, Cynthia S. Nakamura, Clifford K.

Higa, and Sharon On Leng. On May 13, 1994, the court had denied plaintiff's motion seeking injunctive relief against ongoing state medical license revocation proceedings.

Plaintiff had alleged that defendants were proceeding in bad faith. The court, finding insufficient evidence of bad faith, abstained on the basis of *Younger v. Harris*, 401 U.S. 37 (1971).

Defendants now move for dismissal of plaintiff's complaint on the ground that the court lacks jurisdiction because plaintiff asserts no federal right which would give rise to jurisdiction. As the court held in ruling on plaintiff's motion for injunctive relief, though, plaintiff has alleged a specific federal constitutional right – the right to be free from bad faith prosecution. *See Shaw v. Garrison*, 467 F.2d 113, 120 (5th Cir.), *cert. denied*, 409 U.S. 1024 (1972). Contrary to defendants' assertions, the court thus has jurisdiction over this matter.

Accordingly, the court DENIES defendants' motion to dismiss for lack of jurisdiction and STAYS these proceedings pending the outcome of ongoing state proceedings or until such time as plaintiff may produce further probative evidence of bad faith.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, MAY 19, 1994.

/s/ Harold M. Fong
UNITED STATES DISTRICT JUDGE

APPENDIX F

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT S. FLOWERS, M.D., Plaintiff-Appellant, vs. SHERRIE T. SEKI, CYNTHIA S. NAKAMURA, individually and in their official capacities as attorneys for the Regulated Industries complaints office, Department of Consumer Affairs, State of Hawaii; CLIFFORD K. HIGA, in his official capacity as Director of the Department of Commerce and Consumer Affairs, State of Hawaii; SHARON ON LENG, in her official capacity as Complaints Enforcement Officer of the Regulated Industries Complaints Office, Department of Consumer Affairs, State of Hawaii and JOHN DOES 1-20, Defendants-Appellees.	NO. 94-16039 DC NO. CV-94-00190-HMF MEMORANDUM* (Filed Jun. 07, 1996)

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir.R. 36-3.

Appeal from the United States District Court
for the District of Hawaii
Harold M. Fong, District Judge, Presiding

Argued and Submitted February 12, 1996
San Francisco, California

Before: SCHROEDER, D.W. NELSON, and KOZINSKI, Circuit Judges.

Robert S. Flowers, M.D., is the object of a disciplinary action brought by the Regulated Industries Complaints Office ("RICO") of the State of Hawaii Department of Commerce and Consumer Affairs, the prosecutorial agency for the State of Hawaii Board of Medical Examiners. Dr. Flowers alleges that the disciplinary action was brought in bad faith. He brought suit under 42 U.S.C. § 1983 against certain RICO officials ("RICO defendants") for monetary damages and a permanent injunction. Dr. Flowers then moved for a preliminary injunction. The district court denied the motion for preliminary injunction, abstained under *Younger v. Harris*, 401 U.S. 37 (1971), and issued a stay of federal proceedings pending the outcome of the state disciplinary action. We have jurisdiction under 28 U.S.C. § 1292(a). We reverse the district court's judgment, vacate the order staying federal proceedings and instruct the district court to enter a preliminary injunction.

I. Motion to Strike Answering Brief

We first address Dr. Flowers' motion to strike defendants' answering brief. In support of their opposition to Dr. Flowers' emergency motion for stay or injunction of state administrative proceedings, the RICO defendants

attached a supplemental affidavit and exhibits that were not part of the record before the district court. Defendants frequently cite to this supplemental material in their brief for this appeal. They contend that the material is a subsequent development of which this court can take notice under *Middlesex County Ethics Comm'n v. Garden State Bar Ass'n*, 457 U.S. 423 (1982).

Contrary to defendants' assertions, *Middlesex* contemplates the recognition of independent developments subsequent to the proceedings below; it does not contemplate shifts in litigation strategy such as defendants' new willingness to make voluntary disclosures of evidence in their possession at the time of the district court proceedings. Because the supplemental material is not part of the record on appeal as defined by *Fed.R.App.P.* 10, references to it violate *Ninth Cir.R.* 28-2.8. Accordingly, we strike from defendants' brief all references to materials not part of the record before the district court, and we give them no consideration in adjudicating this appeal. *See Kirshner v. Uniden Corp. of America*, 842 F.2d 1074, 1077-78 (9th Cir.1988) (holding that "[p]apers not filed with the district court . . . are not part of the clerk's record and cannot be part of the record on appeal"). Dr. Flowers' motion to strike is denied in all other respects.

II. Denial of Preliminary Injunction and Younger Abstention

We review de novo whether *Younger* abstention was required. *Weiner v. County of San Diego*, 23 F.3d 263, 266 (9th Cir.1994); *Partington v. Gedan*, 880 F.2d 116, 120 (9th Cir.1989) (reviewing de novo "even though we are

reviewing the action of a district court in granting or denying an injunction"), *cert. denied*, 497 U.S. 1038, *and cert. granted and vacated on other grounds*, 497 U.S. 1020 (1990).

We find that Dr. Flowers has demonstrated that the RICO defendants are prosecuting him in bad faith and, therefore, that *Younger* abstention was not appropriate. *See Middlesex*, 457 U.S. at 429. A prosecution is brought in bad faith if, *inter alia*, it is brought without a reasonable expectation of obtaining a valid conviction. *Kugler v. Helfant*, 421 U.S. 117, 126 n. 6 (1973). The district court found that the "prosecution was brought with rather weak evidence, and without a strong basis to expect to prevail." Order Denying Plaintiff's Motion for Preliminary Injunction at 16. In addition, the court found that while the RICO defendants made "little effort to rebut plaintiff's allegations,"

> Dr. Flowers presented evidence that (1) he is a distinguished and renowned plastic surgeon; (2) that defendant Seki, the attorney in charge of the RICO investigation, breached a promise to allow plaintiff to respond to potential charges before a disciplinary petition was prepared; (3) that Mr. Harada, the Board investigator, conducted the investigation in a biased and slanderous manner; (4) that the petition against [Dr. Flowers] is replete with false allegations and factual inaccuracies; (5) that the charges brought against [Dr. Flowers] are without merit; and (6) that leading physicians in the community, after review of the petition and the underlying facts, roundly condemn the petition as unwarranted.

Further, the district court found that the RICO defendants "conducted their investigation in a lackluster and unprofessional manner and the tactics of their investigator are highly questionable, to say the least." We agree with the district court's analysis of the evidence.

We disagree, however, with the court's conclusion that Dr. Flowers failed to demonstrate bad faith because the state has offered some evidence for its case. Dr. Flowers has introduced undisputed evidence that effectively negates each charge leveled against him by RICO. We are persuaded that the RICO defendants have no reasonable expectation of success.

Moreover, evidence alone, even if it rises to the level of probable cause, will not bar a finding of bad faith. *See, e.g., Perez v. Ledesma*, 401 U.S. 82, 118 n. 11 (1971) (Brennan, J. concurring in part and dissenting in part); *Cullen v. Fliegner*, 18 F.3d 96, 103-104 (2d Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 480 (1994); *United States v. P.H.E., Inc.*, 965 F.2d 848, 853 (10th Cir.1992); *Fitzgerald v. Peek*, 636 F.2d 943, 945 (5th Cir.), *cert. denied*, 452 U.S. 916 (1981). The RICO defendants have demonstrated in their brief a substantial bias against both Dr. Flowers and his profession. They assert speculative claims for which they have failed to demonstrate any basis regarding the motives for his professional activities, his income, the psychological profiles of his patients, and the social value of cosmetic surgery among other declarations for which there is no support in the record. For example, the RICO defendants declare, "Dr. Robert S. Flowers, M.D., is a cosmetic plastic surgeon who resides in Honolulu, Hawaii, and who makes millions of dollars performing breast enlargement, facelift, and other forms of socially questionable cosmetic

plastic surgery," Appellees' Br. at 2, and, "[a]lthough he professes to a busy professional schedule of lectures, teaching and other 'good works,' most of these have occurred at such popular resort or travel destinations as . . . New York, Marseille [sic], Paris, Tokyo, Miami, Bankgok [sic], Puerto Villarta, and various resort communities on the outer Hawaiian Islands and elsewhere," *Id.* at 4. The RICO defendants also argue that their prosecution of Dr. Flowers should be afforded great deference because cosmetic surgery has been the object of societal derision:

> Society has long frowned on cosmetic surgery of the type typically practiced by Dr. Flowers, not only because it drains millions if not billions of dollars of government and private subsidies from medical procedures that demonstrably save lives, but because that surgery is 'sold' to the [sic] some of the most psychologically vulnerable individuals in our society. . . .

Id. at 25. Finally, they contend that society could lawfully proscribe the practice of cosmetic surgery entirely: "Society would be wholly within its rights to outlaw what Dr. Flowers does as a crime." *Id.* (emphasis in original). These bald assertions suggest a harassing motivation irrespective of the evidence and belie defendants' claim of good faith.

Consistent with our finding of bad faith and conclusion that *Younger* abstention was inappropriate, we direct the district court to issue a preliminary injunction barring the RICO defendants from pursuing the disciplinary action against Dr. Flowers. We therefore vacate the order staying federal proceedings.

III. Request for Attorney's Fees

Dr. Flowers has requested an award of attorney's fees for this appeal as a "prevailing party" under 42 U.S.C. § 1988.[1] A plaintiff is a prevailing party under section 1988 only when (1) it wins on the merits of its claim, (2) the relief received materially alters the legal relationship between the parties by modifying the defendant's behavior, and (3) that relief directly benefits the plaintiff. *Martinez v. Wilson*, 32 F.3d 1415, 1422 (9th Cir.1994) (citing *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992)). Dr. Flowers meets each of the *Martinez* criteria with respect to the issues before this court. The parties may request fees and state their objections pursuant to *Ninth Cir.R.* 39-1.6 & 39-1.7. The matter is referred to the Appellate Commissioner for a determination of a reasonable fee award. This sum should be added to an award, if any, determined by the district court following the resolution of this case below.

REVERSED, VACATED and REMANDED.

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[1] 42 U.S.C. § 1988 provides in relevant part:

"(b) Attorney's fees

In any action or proceeding to enforce a provision of section [ ] . . . 1983 . . . of this title, . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of costs."

APPENDIX G

Federal and Hawaii Statutes

Title 42. Section 1983, United States Code.

Civil Action for Deprivation of Rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Section 453-2(b)(4), Hawaii Revised Statutes.

License Required; Exceptions.

* * *

(b) Nothing herein shall:

* * *

(4) Prohibit services rendered by any person certified under part II of this chapter to provide emergency medical services, or any physician assistant, when the services are rendered under the direction and control of a physician licensed in this State except for

final refraction resulting in a prescription for spectacles, contact lenses, or visual training as performed by an oculist or optometrist duly licensed by the State. The direction and control shall not be construed in every case to require the personal presence of the supervising and controlling physician. Any physician who employs or directs a person certified under part II of this chapter to provide emergency medical services, or physician assistant, shall retain full professional and personal responsibility for any act which constitutes the practice of medicine when performed by such person or physician assistant; or

* * *

Section 453-8, Hawaii Revised Statutes.

Revocation, Limitmation, Suspension or Denial of Licenses.

(a) In addition to any other actions authorized by law, any license to practice medicine and surgery may be revoked, limited, or suspended by the board at any time in a proceeding before the board, or may be denied, for any cause authorized by law, including but not limited to the following:

(1) Procuring, or aiding or abetting in procuring, a criminal abortion;

(2) Employing any person to solicit patients for one's self;

(3) Engaging in false, fraudulent, or deceptive advertising, including, but not limited to:

(A) Making excessive claims of expertise in one or more medical specialty fields;

(B) Assuring a permanent cure for an incurable disease; or

(C) Making any untruthful and improbable statement in advertising one's medical or surgical practice or business;

(4) Being habituated to the excessive use of drugs or alcohol; or being addicted to, dependent on, or a habitual user of a narcotic, barbiturate, amphetamine, hallucinogen, or other drug having similar effects;

(5) Practicing medicine while the ability to practice is impaired by alcohol, drugs, physical disability, or mental instability;

(6) Procuring a license through fraud, misrepresentation, or deceit or knowingly permitting an unlicensed person to perform activities requiring a license;

(7) Professional misconduct, hazardous negligence causing bodily injury to another, or manifest incapacity in the practice of medicine or surgery;

(8) Incompetence or multiple instances of negligence, including, but not limited to, the consistent use of medical service which is inappropriate or unnecessary;

(9) Conduct or practice contrary to recognized standards of ethics of the medical

profession as adopted by the Hawaii Medical Association or the American Medical Association;

(10) Violation of the conditions or limitations upon which a limited or temporary license is issued;

(11) Revocation, suspension, or other disciplinary action by another state or federal agency of a license, certificate, or medical privilege for reasons as provided in this section;

(12) Conviction, whether by nolo contendere or otherwise, of a penal offense substantially related to the qualifications, functions, or duties of a physician, notwithstanding any statutory provision to the contrary;

(13) Violation of chapter 329, the uniform controlled substances act, or any rule adopted thereunder;

(14) Failure to report to the board, in writing, any disciplinary decision issued against the licensee or the applicant in another jurisdiction within thirty days after the disciplinary decision is issued; or

(15) Submitting to or filing with the board any notice, statement, or other document required under this chapter, which is false or untrue or contains any material misstatement or omission of fact.

(b) If disciplinary action related to the practice of medicine has been taken against the applicant in any jurisdiction that would constitute a violation under this section, or if the applicant reveals a physical or mental

condition that would constitute a violation under this section, then the board may impose one or more of the following requirements as a condition for licensure:

(1) Physical and mental evaluation of the applicant by a licensed physician approved by the board;

(2) Probation, including such conditions of probation as requiring observation of the licensee by an appropriate group or society of licensed physicians or surgeons;

(3) Limitation of the license by restricting the fields of practice in which the licensee may engage;

(4) Further education or training or proof of performance competency; and

(5) Limitation of the medical practice of the licensee in any reasonable manner to assure the safety and welfare of the consuming public.

* * *